TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1955

No. 503

CECIL REGINALD JAY, PETITIONER,

vs.

JOHN P. BOYD, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 2, 1955

CERTIORARI GRANTED JANUARY 9, 1956

No. 14545

United States
Court of Appeals
for the Ninth Circuit.

CECIL REGINALD JAY,

Appellant,

vs.

JOHN P. BOYD, District Director, Immigration and Naturalization Service,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Western District of Washington Northern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—12-10-54

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

For the Appellant:

JOHN CAUGHLAN,
702 Lowman Bldg.,
Seattle 4, Washington.

For the Appellee:

CHARLES P. MORIARTY,
U. S. Attorney;

FRANCIS N. CUSHMAN,
Assistant U. S. Attorney,
1012 U. S. Courthouse,
Seattle 4, Washington.

JOHN W. KEANE,
Attorney for Appellee,
815 Airport Way,
Seattle 4, Washington.

In the District Court of the United States for the Western District of Washington, Northern Division

No. 3700

CECIL REGINALD JAY,

Petitioner,

vs.

JOHN P. BOYD, District Director, Immigration and Naturalization Service,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner respectfully shows the court, and alleges as follows:

I.

The jurisdiction of the court arises under Title 28, United States Code, Sec. 2241 and following, in that petitioner is now in custody of respondent, the District Director, Immigration & Naturalization Service, and petitioner is restrained of his liberty under color of authority of the United States, and is retained in custody in violation of the Constitution and laws of the United States.

2.

Petitioner is a permanent resident of King County, Washington. He was born in Great Yarmouth, England, January 12, 1891; he entered the United States for permanent residence on May 9, 1914; in 1916 he enlisted in the armed services of

Canada, and returned to the United States in October, 1922, pursuant to a Presidential Proclamation, whereby all persons previously admitted to the United States for permanent residence who had thereafter departed from the United States for the purpose of enlisting in the armed services of a country allied to the United States in the war then recently concluded in which hostilities had ceased on November 11, 1918, should be readmitted to the United States without being required to reenter as an immigrant; and since said time petitioner has resided continuously in the United States.

3.

Petitioner was arrested on July 18, 1949, and charged with being unlawfully in the United States, said charge thereafter being amended to charge that petitioner was unlawfully in the United States in that he was since his entry a member of the Communist Party, i.e., that he was a member of said Communist Party prior to 1940.

4.

Hearings were held with respect to said charges and thereafter an officer of the Immigration and Naturalization Service in Seattle, acting under the direction of the respondent, John P. Boyd, issued a proposed findings of fact and conclusions of law and a proposed administrative determination that petitioner was subject to deportation from the United States, and said determination was based upon a finding of fact that petitioner had been a member

of the Communist Party of the United States for a period prior to 1940.

5.

Thereafter, the Assistant Commissioner, Adjudications Department, Immigration and Naturalization Service, Washington, D. C., made and issued an order that petitioner be deported from the United States on the ground that he was, after entry, a member of the following class:

> An Alien who was a member of the Communist Party of the United States.

6.

Thereafter petitioner duly appealed from the said decision to the Board of Immigration Appeals, Department of Justice, Washington, D. C., and thereafter an order was issued by said Board of Immigration Appeals disposing of said appeal upon the merits as follows:

> "It is ordered that the appeal be and the same is hereby dismissed."

7.

The purported order of deportation of petitioner, and all proceedings taken against petitioner are null and void and of no effect in that petitioner has at no time violated any condition imposed at the time of his entry, nor has any charge been made against him that he has done so, and, except as stated above, no lawful power to expel petitioner exists under the Constitution or laws of the United States.

8.

Thereafter, and on or about June 30, 1953, pursuant to the provisions of Title 8, United States Code, Sec. 1254 (a) (5), and 1254 (b) (Act of June 27, 1952, Ch. 477, Sec. 244 (a) (5); and 244 (b); 66 Stat. 214), petitioner applied to the Attorney General for discretionary relief suspending the order of deportation against petitioner; and on or about August 3, 1953, pursuant to said petition, by order of the Board of Immigration Appeals, said order of deportation was withdrawn to permit petitioner to seek discretionary relief from the Attorney General.

9.

Thereafter, petitioner presented evidence to a special inquiry officer appointed by or under the direction of the Attorney General, which evidence established to the satisfaction of said officer that petitioner had been physically present in the United States continuously for more than 10 years since the act or status which constituted the ground for the charge against him, and upon which the order of deportation was based; that throughout this period of time petitioner had been a person of good moral character, and that his deportation would result in exceptional and extremely unusual hardship to him, and that he was an alien who had been lawfully admitted to the United States for permanent residence.

10.

On or about February 3, 1954, said special inquiry officer found petitioner to be qualified for suspension

of deportation, but concluded that petitioner's application for suspension of deportation did not warrant favorable consideration. Said conclusion was purportedly based upon "confidential information," the general or particular character of which was not disclosed, nor in any manner incorporated, in the record, nor made a part of the files for consideration of this matter.

11.

Upon information and belief, petitioner alleges that the character of the so-called "confidential information" referred to in the preceding paragraph of this petition is as follows:

Without notice or hearing the Attorney General issued a list of organizations stated to be "subversive"; included among such organizations was an organization known as the "American Committee for the Protection of the Foreign Born"; said committee issued a list of persons against whom deportation proceedings are now pending, including in said list petitioner's name, and soliciting support for such persons; this list and information that support for petitioner was solicited by said committee, listed ex parte as "subversive" by the Attorney General, was circulated by or under the direction of the Attorney General among all employees in the Immigration Service and to the Board of Immigration Appeals.

Solely by reason of petitioner's name appearing on said list, his case for discretionary relief was prejudged and no fair or impartial consideration of

his case was given by said special inquiry officer, and the conclusion and decision that petitioner's case did not warrant favorable consideration was based entirely upon information outside the record and such conclusion was frivolous and capricious; and the so-called "confidential information" upon which the conclusion and decision against petitioner was purportedly based was not properly or lawfully considered by said special inquiry officer, and said information was not of a character whose disclosure to petitioner would be prejudicial in any manner to the public interest, safety or security, nor was said special inquiry officer of the opinion that such would be the case, nor did he so find or state.

12.

Petitioner appealed the recommendation of the special inquiry officer to the Board of Immigration Appeals, setting forth to said board that his deportation was unlawful, and that no fair or impartial consideration has been given his petition, and that a decision or conclusion based upon confidential information, or confidential information whose disclosure would not be prejudicial to public interest, safety or security was unlawful; but for the reasons stated in the preceding paragraph, no fair or impartial consideration of petitioner's application for discretionary relief, or his appeal was given by the Board of Immigration Appeals, and petitioner has been entirely denied any consideration of his petition for relief, nor has the Attorney General exercised his discretion with respect to petitioner's application in the manner required by law, or at all.

13.

For the reasons set forth in the preceding paragraph the Board of Immigration Appeals denied petitioner's appeal and reinstated the order of deportation against him.

14.

During the pendency of the proceedings described herein petitioner has been enlarged upon a bond in an amount and form approved by the Immigration and Naturalization Service; following the dismissal of his appeal, as alleged in the preceding paragraph, said bond has been cancelled, petitioner has been returned by his bondsmen to the custody of respondent, and is at present unlawfully and wrongfully restrained of his liberty as hereinabove alleged.

Wherefore, petitioner prays that this court issue its writ of habeas corpus, permanently discharging petitioner from the custody of respondent, or of any other persons under any warrant of deportation, and that pending hearing upon his petition, he be released upon bond, conditioned similarly to the bond upon which he was enlarged immediately prior to his present detention, and that the court grant such other, further or different relief as may be found to be just, proper and equitable in the premises.

/s/ JOHN CAUGHLAN,
Attorney for Petitioner.

[Endorsed]: Filed May 3, 1954.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE, AND ORDER WITH RESPECT TO RELEASE OF PETITIONER UPON BOND PENDING HEARING

This matter having come on duly and regularly before the undersigned judge of the above-entitled court upon the verified petition of petitioner for a writ of habeas corpus, and it appearing to the court from consideration of said petition that petitioner is now restrained of his liberty and detained in custody by respondent, under color of authority of the United States, and it further appearing from said petition that the court should inquire into the cause and legality of said detention, and the court being advised, Now, Therefore,

It Is Hereby Ordered that respondent, John P. Boyd, District Director, Immigration and Naturalization Service, or his authorized representative, be and appear before the undersigned District Judge of the above-entitled court at the United States Courthouse, Seattle, Washington, at 3 p.m. on the 28th of June, 1954, then and there to show cause, if any there be, why the petition of petitioner should not be granted, and petitioner be permanently discharged from custody, and

It Is Further Ordered that, pending return of this order to show cause, and hearing upon the petition of petitioner, that petitioner be enlarged by respondent upon bond, conditioned similarly, and in

the same amount, as the bond upon which petitioner was enlarged immediately prior to his present detention by respondent.

Done in Open Court this 3rd day of May, 1954.

/s/ WILLIAM J. LINDBERG,
U. S. District Judge.

Presented by:

/s/ SAUL H. LESSER,
For John Caughlan, Attorney for Petitioner.

[Endorsed]: Filed May 3, 1954.

[Title of District Court and Cause.]

RETURN

John W. Keane states that he is an attorney in the service of the United States Department of Justice, Immigration and Naturalization Service; that in his official capacity he is authorized to make in behalf of John P. Boyd, District Director, and hereby does make the following return to the order to show cause herein.

I.

That Cecil Reginald Jay, hereinafter referred to as the petitioner, is not being wrongfully or illegally restrained by the respondent but was surrendered into the custody of the respondent on May 3, 1954, by virtue of a lawful order of deportation entered February 3, 1954.

II.

The petitioner is sixty-two years of age, male, native of Great Yarmouth, England, citizen of Great Britain, who last entered the United States at Seattle, Washington, in the fall of 1921. Deportation proceedings were instituted against the petitioner on July 1, 1949, charging that he was in the United States illegally by virtue of the Act of October 16, 1918, as amended (8 USCA 137). A hearing on the charges commenced June 19, 1950. During the course of the continued hearing on December 5, 1950, the government lodged an additional charge that the petitioner was deportable by virtue of Section 22 of the Internal Security Act of September 23, 1950, which statute amended the Act of October 16, 1918, in that he had been a member of the Communist Party of the United States. During the course of the hearing the petitioner voluntarily testified that he was a member of the Communist Party of the United States from some time in 1935 to the latter part of 1940. The hearing officer found him deportable April 16, 1951. The petitioner appealed to the Board of Immigration Appeals. The Board of Immigration Appeals on December 5, 1952, affirmed the decision of the Special Inquiry Officer and the appeal was dismissed.

III.

An action for a writ of habeas corpus and petition for review was commenced in this court January 17, 1953, being Cause No. 3344. After hearing, the court denied the petition March 10, 1953. No appeal was taken from the decision of the court.

IV.

That about June 30, 1953, the petitioner filed a motion with the Board of Immigration Appeals to reopen his case to allow him to apply for suspension of deportation under Section 244(a)(5) of the Immigration and Nationality Act of 1952 (8 USCA Section 1254(a)(5)). Without passing on his eligibility, the Board of Immigration Appeals on August 3, 1953, directed the order of deportation withdrawn and the hearing reopened for the purpose of allowing the petitioner to file an application for suspension of deportation.

V.

The petitioner filed a written application for suspension of deportation on November 25, 1953. A hearing was had before Special Inquiry Officer David S. Caldwell at which time the petitioner was represented by counsel. On February 3, 1954, the Special Inquiry Officer entered a written decision pursuant to Title 8, Code of Federal Regulations, Section 242.61, denying the petitioner's application for suspension of deportation on the basis of confidential information relating to the petitioner, the disclosure of which in the opinion of the Special Inquiry Officer would be prejudicial to the public interest, safety, and security under the authority of Title 8, Code of Federal Regulations, Section 244.3. The Special Inquiry Officer further ordered the petitioner deported under the Act of October 16, 1918, as amended (8 USCA 137), as a member of a class set forth in Section 1 of said Act, as an alien

who was a member of the Communist Party. On February 17, 1954, the petitioner, through his attorney, appealed to the Board of Immigration Appeals. On April 9, 1954, in a written opinion, the Board of Immigration Appeals, after a full consideration of the evidence of record and in the light of the confidential information, concluded that the alien was not entitled to discretionary relief and dismissed the appeal. On April 20, 1954, the respondent notified the petitioner to report for deportation May 3, 1954, and this action was commenced. The record, duly certified, of proceedings on the petitioner's application for suspension of deportation, including the transcript of hearing, exhibits, opinions of the Special Inquiry Officer and the Board of Immigration Appeals, are attached to and made a part of this return, marked Exhibit A, the same as if they had been fully set out herein.

VI.

The respondent denies that the confidential information relied upon by the Special Inquiry Officer and the Board of Immigration Appeals, acting for the Attorney General, was of the character or substance alleged by the petitioner in paragraph 11 of the petition; denies that the Special Inquiry Officer or the Board of Immigration Appeals prejudged petitioner's case because of the possession of any list issued by the Committee for the Protection of the Foreign Born.

Wherefore, it is prayed that the petition for a

writ of habeas corpus be dismissed and the rule to show cause quashed.

/s/ JOHN W. KEANE,
Attorney for Respondent.

[Endorsed]: Filed June 10, 1954.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on for hearing on an order to show cause July 1, 1954, the petitioner appearing by counsel, John Caughlan and C. T. Hatten; the respondent, District Director, being represented by F. N. Cushman, Assistant United States Attorney, and John W. Keane, Attorney, Immigration and Naturalization Service, a return and answer having been filed by the respondent together with a certified copy of the proceedings on the petitioner's application for discretionary relief before the Immigration and Naturalization Service, and testimony having been heard and briefs filed by the respective parties, and the court, after oral argument of counsel, having been fully advised in the premises and having made an oral decision on July 1, 1954, the following findings of fact and conclusions of law are hereby made pursuant to Rule 52(a) of the Federal Rules of Civil Procedure:

Findings of Fact

I.

The petitioner, Cecil Reginald Jay, is an individ-

ual seeking relief from an order of deportation and discharge from the custody of the respondent, John P. Boyd, District Director of the United States Immigration and Naturalization Service, Department of Justice; both parties reside in the Western District of Washington.

II.

The petitioner was born at Great Yarmouth, England, January 12, 1891, and entered the United States in 1921. He never naturalized or otherwise became a citizen of the United States.

III.

The petitioner was ordered deported February 3, 1954, under the Act of October 16, 1918, as amended, (8 USCA 137), as an alien who had from 1935 through 1940 been a voluntary member of the Communist Party of the United States; the fairness of the deportation proceeding has not been challenged.

IV.

On November 25, 1953, the petitioner filed a written application with the Immigration and Naturalization Service for discretionary relief under 8 USC 1254(a)(5). A hearing was held on February 3, 1954. The special inquiry officer found, "On the record, respondent appears to be qualified for suspension of deportation. However, after considering confidential information relating to the respondent, as is provided for under 8 CFR 244.3, it is concluded that the respondent's case does not warrant favorable action and that his application for suspension

of deportation be denied." He thereafter ordered the petitioner deported as recited above.

V.

The petitioner appealed to the Board of Immigration Appeals. The Board of Immigration Appeals on April 9, 1954, in a written decision, stated, "Upon a full consideration of the evidence of record and, in light of the confidential information available, it is concluded that the alien is not entitled to discretionary relief," and ordered the appeal dismissed.

VI.

That the special inquiry officer and the Board of Immigration Appeals, acting for the Attorney General, exercised their independent judgment in denying discretionary relief. From the foregoing findings of fact the court does make the following:

Conclusions of Law

I.

Congress may by statute constitutionally provide for the expulsion of aliens for reasons which were not made a condition at the time of his entry.

II.

The Attorney General, under the provisions of Section 244(a)(5) of the Immigration and Nationality Act of 1952 (8 USCA 1254(a)(5)), or his authorized agent, may, after complying with all the essentials of due process of law in the deportation hearing and in the hearing to determine eligibility for suspension of deportation, in the absence of a

statutory direction or regulations to the contrary, consider confidential information outside the record in formulating his discretionary decision.

III.

The provisions of Title 8, Code of Federal Regulations, Section 244.3, should not be construed to impose implied limitations or restrictions on the special inquiry officer or the Board of Immigration Appeals but the purpose of the regulation is to indicate that confidential information which would be prejudicial to the public interest, safety, or security need not be disclosed. A special finding that such information would be prejudicial to the public interest, safety, or security is not required by the regulation.

Done in Open Court this 14th day of July, 1954.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

Approved as to form:

/s/ JOHN CAUGHLAN,
Attorney for Petitioner.

Presented and approved as to form by:

/s/ [Illegible.]
Assistant United States Attorney.

/s/ JOHN W. KEANE,
Attorney, Immigration and Naturalization Service.

[Endorsed]: Filed July 14, 1954.

[Title of District Court and Cause.]

ORDER

This matter having been heard by the court on July 1, 1954, the petitioner appearing by counsel, John Caughlan and C. T. Hatten, and the respondent being represented by F. N. Cushman, Assistant United States Attorney, and John W. Keane, Attorney, Immigration and Naturalization Service, evidence and oral argument having been considered, and the court heretofore having entered its oral opinion and stated its findings of fact and conclusions of law,

Now, Therefore, It Is Ordered, Adjudged and Decreed that the application for a writ of habeas corpus be and the same is hereby denied and the rule to show cause heretofore issued is discharged.

Done in open court this 14th day of July, 1954.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

Approved as to form:

/s/ JOHN CAUGHLAN,
Attorney for Petitioner.

Presented and approved as to form by:

/s/ [Illegible.]
Assistant United States Attorney.

/s/ JOHN W. KEANE,
Attorney, Immigration and Naturalization Service.

[Endorsed]: Filed and entered July 14, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Cecil Reginald Jay, petitioner above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from that certain judgment denying application and petition for writ of habeas corpus, and discharging the same, and from the proceedings on which said judgment is founded, said judgment having been entered in this action of the 14th day of July, 1954.

Dated this 10th day of September, 1954.

/s/ JOHN CAUGHLAN,
Attorney for Petitioner.

[Endorsed]: Filed September 13, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of Civil Procedure, I am transmitting herewith all of the original papers in the file dealing with the action as the record on

appeal herein from the judgment denying application and petition for writ of habeas corpus and discharging the same, and from the proceedings on which said judgment is founded, said judgment having been filed July 14, 1954, to the United States Court of Appeals for the Ninth Circuit at San Francisco, said papers being identified as follows:

1. Petition for Writ of Habeas Corpus, filed May 3, 1954.

2. Order to Show Cause, filed May 3, 1954.

3. Marshal's Return on Order to Show Cause, filed May 6, 1954.

4. Memorandum in Support of Petition for Habeas Corpus, filed 6/7/54.

5. Return of Respondent, filed June 10, 1954, with records of Immigration and Naturalization Service, marked Exhibit "A" attached.

6. Respondent's Memorandum of Authorities, filed June 15, 1954.

7. Findings of Fact and Conclusions of Law, filed July 14, 1954.

8. Order Denying Application for Writ of Habeas Corpus, filed 7/14/54.

9. Notice of Appeal, filed Sept. 13, 1954.

10. Stipulation for Cost Bond on Appeal ($250.00 cash by Petitioner), filed Sept. 13, 1954.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for preparation of the record on appeal in this cause, to wit:

Filing fee, Notice of Appeal, $5.00; and that said amount has been paid to me by the Appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle this 7th day of October, 1954.

[Seal] MILLARD P. THOMAS,
Clerk.

By /s/ TRUMAN EGGER,
Chief Deputy.

te:s

[Endorsed]: No. 14,545, United States Court of Appeals for the Ninth Circuit. Cecil Reginald Jay, Appellant, vs. John P. Boyd, District Director, Immigration and Naturalization Service, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed October 9, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14,545

CECIL REGINALD JAY,

Appellant,

vs.

JOHN P. BOYD, District Director, Immigration and Naturalization Service,

Appellee.

CONCISE STATEMENT OF POINTS TO BE RELIED UPON BY APPELLANT ON APPEAL

1.

The Court erred in concluding that appellant could constitutionally be expelled upon grounds not made a condition at the time of his entry.

2.

The Court erred in concluding that appellant's petition for suspension of deportation could be denied on the basis of consideration of undisclosed confidential information without the determination that the disclosure to appellant of such confidential information would be prejudicial to the public interest, safety or security.

/s/ JOHN CAUGHLAN,
Attorney for Appellant.

[Endorsed]: Filed November 4, 1954.

[fol. 24] PROCEEDINGS HAD IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 14545

CECIL REGINALD JAY, Appellant

vs.

JOHN P. BOYD, District Director, Immigration & Naturalization Service, Appellee

Appeal from the United States District Court, for the Western District of Washington, Northern Division.

[fol. 24a] UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ORDER OF SUBMISSION—May 2, 1955

Ordered appeal herein submitted to the Court for consideration and decision on briefs on file.

[fol. 25] UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT—May 10, 1955

Ordered that the typewritten per curiam opinion this day rendered by this Court in above cause be forthwith filed by the Clerk, and that a Judgment be filed and recorded in the minutes of the Court in accordance with the opinion rendered.

[fol. 26] UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 14,545

CECIL REGINALD JAY, Appellant

vs.

JOHN B. BOYD, District Director, Immigration and Naturalization Service, Appellee

PER CURIAM OPINION—May 10, 1955

Appeal from the United States District Court for the Western District of Washington, Northern Division.

Before Healy, Pope and Chambers, Circuit Judges

Per Curiam.

The appellant, a citizen of Great Britain, entered the United States in 1921, where he has since resided. From 1935 to 1940, according to his own testimony in the deportation proceedings herein mentioned, he was a member of the Communist Party of the United States. After passage of the Internal Security Act of September 23, 1950, he was ordered deported as an alien who had been a voluntary member of the Communist Party. After exhausting his administrative remedies before the Board of Immigration Appeals, appellant has attempted by petition for writ of habeas corpus in the court below to assert that he cannot be expelled for membership in the Communist Party from 1935 to 1940 since non-membership was not made a condition of his entry. The court below correctly rejected this contention. Galvan v. Press, 347 U.S. 522.

Appellant applied for suspension of deportation under § 244(a)(5) of the Immigration and Nationality Act of 1952, [fol. 27] (8 U.S.C.A. 1254(a)(5)), which provides that the Attorney General may in his discretion suspend deportation in certain cases. Upon hearing held on this application before a special inquiry officer, that officer denied the application reciting that the denial was on the basis of confidential information relating to the appellant, disclosure of

which, in the opinion of the officer, would be prejudicial to the public interest.

This ruling of the officer was expressly authorized by C.F.R. Title 8, § 244.3.

Appellant attacks his detention upon the ground that he was denied due process of law in the consideration of his application for suspension of deportation because of the use of this confidential information. This contention is likewise wholly without merit. U. S. ex rel. Matranga v. Mackey, 2 cir., 210 F. 2d 160.

The decision denying appellant's application for writ of habeas corpus is affirmed.

[fol. 28] UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 14,545

CECIL REGINALD JAY, Appellant,

vs.

JOHN P. BOYD, District Director, Immigration & Naturalization Service, Appellee

JUDGMENT—May 10, 1955

Appeal from the United States District Court for the Western District of Washington, Northern Division.

This cause came on to be heard on the Transcript of Record from the United States District Court for the Western District of Washington, Northern Division, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the order of the said District Court in this cause be, and hereby is affirmed.

[File endorsement omitted.]

[fol. 29] UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ORDER DIRECTING FILING OF OPINION ON PETITION FOR REHEARING—August 4, 1955

Ordered that the typewritten per curiam opinion on petition for rehearing this day rendered by this Court in above cause be forthwith filed by the Clerk.

[fol. 30] UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 14,545

CECIL REGINALD JAY, Appellant,

vs.

JOHN B. BOYD, District Director, Immigration and Naturalization Service, Appellee

PER CURIAM OPINION ON REHEARING—August 4, 1955

Before Healy, Pope and Chambers, Circuit Judges.

PER CURIAM:

By petition for rehearing appellant asserts our opinion was incorrect in stating that the special hearing officer who denied the requested suspension did so on the basis of confidential information "disclosure of which, in the opinion of the officer, would be prejudicial to the public interest." It is asserted that the findings show that the officer's order did not use the quoted words which are those used in the Regulation cited in the opinion.

The precise words of the order were: "On the record, respondent appears to be qualified for suspension of deportation. However, after considering confidential information relating to the respondent, as is provided for under 8 CFR 244.3, it is concluded that the respondent's case does not warrant favorable action and that his application for

suspension of deportation be denied." We think that this is a statement to the effect that the hearing officer was considering the confidential information under the circumstances, upon the conditions, and in the manner provided by the regulation. He considered it "as is provided for" under the regulation.

The discretionary power granted the Attorney General is limited only by the latter's self-imposed regulations. Ac-
[fol. 31] cardi v. Shaughnessy, 347 U.S. 260, 265. Here it is apparent that the officer complied with the regulation as a matter of substance. We agree with the trial court that the regulations require no special finding in any particular words or language. We have no authority to review the discretionary determination here made. Rehearing denied.

[fol. 32] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 33] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 9, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 1] UNITED STATES DEPARTMENT OF JUSTICE

Immigration and Naturalization Service, Seattle, Washington

TRANSCRIPT OF PROCEEDINGS—November 25, 1953

File E-053-646

Deportation Proceedings (Reopened)

Date: November 25, 1953.
Place: Immigration Station, Seattle.
Special Inquiry Officer: David S. Caldwell.
Examining Officer: Robert L. Needham.
Shorthand Reporter: Joseph H. Ramquist.
Language Used: English.
Respondent's Counsel: Siegfried Hesse, Attorney at Law, 702 Lowman Building, Seattle, Wash.
Respondent: Cecil Reginald Jay.

By Special Inquiry Officer to Examining Officer and Counsel:

Q. Are both parties ready to proceed?
A. (By both)—Yes.

By Special Inquiry Officer to Respondent:

Q. Will you please state your name for the record?
A. Cecil Reginald Jay.
Q. What is your present address?
A. 1633 Boyleston.
Q. Are you the same Cecil Reginald Jay who was last accorded a hearing under deportation proceedings by me at the offices of this Service in Seattle on December 14, 1950?
A. Yes.
Q. You are advised that pursuant to an order dated August 3, 1953, the Board of Immigration Appeals directed that the outstanding order of deportation in your case be withdrawn and that the proceedings be reopened to afford you an opportunity to petition for suspension of deporta-

tion pursuant to Section 244(a)(5) of the Immigration and Nationality Act of 1952. Do you understand?

A. Yes.

Q. At this hearing is it your desire to be represented by Siegfried Hesse?

A. Yes.

By Special Inquiry Officer to Counsel:

Q. Will you please state your name and business address for the record?

A. Siegfried Hesse, attorney at law, 702 Lowman Building, Seattle.

Q. And you have filed notice of appearance at this hearing?

A. Yes.

[fol. 2] Q. Are you ready to proceed with the hearing at this time?

A. I am.

By Special Inquiry Officer to Respondent:

Q. Are you prepared at this time to submit an application for suspension of deportation pursuant to Section 244 of the Immigration and Nationality Act?

A. I am.

Q. Are you also prepared at this time to submit documents in support of this application?

A. Yes.

By Counsel: There are two former employees and one former landlord whom we have not been able to contact yet.

By Respondent: The two former employees would cover the residence period also. Would that be sufficient by both of the people? I was employed as a manager.

By Special Inquiry Officer to Respondent:

Q. What period of time would that cover?

A. That was for the period up until about the 1st of November last year from May.

Q. A period of about seven months?

A. Yes. The other one is from May up to the present. That is, the place has been sold and just changed hands and

the original owner is out of town most of the time. He told me he was going to send it.

Q. You have taken steps to secure those documents?

A. Yes.

By Counsel: I would like, if it is agreeable with counsel for the government, to have it stipulated that they be entered later.

By Examining Officer: I will agree to that.

By Special Inquiry Officer: The following application, together with the documents submitted by the respondent, will be received in evidence as follows:

Reopened Exhibit A—Application for suspension of deportation executed by the respondent at Seattle, Washington on November 25, 1953.

Reopened Exhibit B—Affidavit of one Ray C. Robert, executed November 20, 1953 at Seattle, Washington, relative to the respondent's residence and good moral character from 1934 to 1953.

[fol. 3] *Reopened Exhibit C*—Affidavit of one Rolla V. Houghton, an attorney at law, executed November 20, 1953 at Seattle, Washington relative to the respondent's residence and good moral character during the period from July, 1934 to November, 1953.

Reopened Exhibit D—Affidavit of one J. R. Adams, Assistant Executive Director of the Seattle Housing Authority executed at Seattle November 6, 1953 relative to the respondent's employment by that Authority from June 16, 1944 until December 28, 1950.

Reopened Exhibit E—Affidavit by one J. R. Adams, Assistant Executive Director of the Seattle Housing Authority, executed at Seattle, Washington on November 5, 1953 with respect to the residence of the respondent in Seattle from October 15, 1943 through January 25, 1950.

Reopened Exhibit F—Letter on the stationery of the Seattle Police Department dated November 6, 1953 reflecting that a search of their files for the past seven year period has revealed no arrest record in the name of the respondent.

Reopened Exhibit G—Letter on the stationery of the King County Welfare Department, dated November 16,

1953, indicating that the respondent has received no assistance from the King County Welfare Department.

By Special Inquiry Officer to Respondent:

Q. Now, then, you say you have two other affidavits from places of your employment since 1950?

A. In 1943, that is the whole ten years. That employment record starts in June, 1944. Prior to that I was with Pacific Huts, which is non-existent now. I have been trying to get in touch with somebody with Pacific Huts during that period.

Q. So in effect the period of your employment from 1943 to June, 1944 is trying to be obtained. What about your employment and residence—or rather, your employment after you left the housing Authority in 1950?

A. There was a period when I was unemployed, and then after that I managed an apartment house on 23rd North, and I am now managing the one where I am at now, and this Ed Chinn who used to own the other apartment, the Rosemont, I haven't been able to get in touch with him. He has a cafe in Renton. I phoned his wife and she told him about it.

Q. So in effect, you are trying to contact this party with respect to your employment since 1950—December, 1950—with the exception of your unemployment?

A. And also the residence.

Q. Then it would appear that it would be three employment records and two residence records which you are in the process of obtaining now, is that right?

A. Yes.

[fol. 4] Q. In agreement between the government examiner and respondent's counsel, the three employment records as well as the residence records which the respondent is attempting to obtain, when received, will be received in evidence in the order of their receipt and marked *Reopened Exhibits H, I, J, K, & L.* Do you understand?

A. Yes.

(Examining Officer examines the exhibits.)

By Special Inquiry Officer to Examining Officer:

Q. Does the government have any objection to the re-opened exhibit A to G?

A. I have no objections to these exhibits.

By Special Inquiry Officer to Counsel: You may proceed, Mr. Hesse?

By Counsel to Respondent:

Q. Mr. Jay, when did you first come to the United States?

A. I think it was May 9, 1914.

Q. Where did you come from?

A. Canada.

Q. Were you born in Canada?

A. No.

Q. Where were you born?

A. England.

Q. How long had you been living in Canada?

A. I should say—prior to that, you mean?

Q. Yes.

A. I am not so sure. Maybe one or two years.

Q. After entering the United States in 1914, have you left the United States since that time?

A. Yes.

Q. When was that?

A. December, 1915.

Q. What was your purpose in leaving?

A. To join the Canadian Army.

Q. Did you join the Canadian Army?

A. Yes.

Q. Where did you serve in the Canadian Army?

A. In France and Belgium.

[fol. 5] Q. When were you discharged from the Canadian Army?

A. Somewhere around 1920, in the fall of 1920 or 1921. I was discharged in 1920 and then I served in the reorganized militia in New Westminster, B. C.

Q. When did you next seek to enter the United States?

A. Either October, 1921 or 1922.

Q. Do you have a paper by which you could refresh your recollection?

A. Yes.

By Examining Officer: I believe the record shows the fall of 1921.

By Respondent: October, 1921.

By Examining Officer. I have a note that it was fall of 1921.

By Respondent: Yes.

By Counsel to Respondent:

Q. Then you reentered the United States in the fall of 1921?

A. Yes.

Q. Have you ever left the country since that date?

A. No.

Q. Have you been a permanent resident of the United States since that date?

A. Since 1921?

Q. Have you ever been a member of the Communist Party?

A. Yes, I was.

Q. Approximately how long were you a member of the Communist Party?

A. I can't remember definitely, 1936 to 1937. I am certain I was in it no longer than 1941.

Q. The outside limits of membership would be somewhere around 1936 to 1941, or it could be less than that?

A. Yes. I have nothing else to go by.

Q. Have you ever been a member of the Communist Party since 1941, in any event?

A. No.

Q. What other organizations have you belonged to since 1944?

A. Well, I belong to the Canadian Legion and the union, the Building Trades Union.

Q. Any other organizations that you can think of?

A. I joined the Technocrats for a month or two.

[fol. 6] Q. Do you remember what year that was?

A. I can't remember what year.

Q. Was it early 1940 or late 1940?

A. Yes, it was when the Technocrats just started up in the University District. I can't place that exactly.

Q. In any event it was in the early '40's?

A. Yes.

Q. What has been your employment for the past ten years?

A. Well, I went into war work, Pacific Huts, and I think I was there about a year.

Q. What type of work did you do there?

A. Laborer at first, and when I finished I was promoted to supervisor.

Q. Thereafter, where did you work?

A. I started work at Seattle Housing.

Q. How long did you work there?

A. From June, 1944 to December, 1950.

Q. What was the nature of your employment with the Seattle Housing?

A. Maintenance Supervisor.

Q. What did that involve?

A. Supervise all the maintenance work in the project. It was the biggest project finally. Supervising renovation, painting, plumbing, electrical work and inspect all the apartments, giving an estimate of the cost of repair.

Q. After leaving Seattle Housing where have you worked?

A. I didn't do much at all after leaving Seattle Housing. I felt kind of discouraged.

Q. Immediately after leaving Seattle Housing?

A. Yes.

Q. What has been your employment since?

A. Apartment house manager.

Q. In other words you have been doing essentially the same kind of work as you were while at Seattle Housing, inspecting of apartments?

A. Yes.

Q. What is your present employment?

A. That is the same.

Q. In other words, for at least the past eight or nine years that has been your employment, maintenance and inspecting of apartment houses and things like that?

A. Yes.

[fol. 7] Q. Do you have any contact with any members of your family here in the United States?

A. No, not for years.

Q. Who are the members of your family in the United States?

A. I have a daughter I presume to be here. She was born here in Seattle and she wrote and told me she was coming here. I don't know, I have moved around so much, maybe she lost contact with me.

Q. You have no close contact with any member of your family?

A. No.

Q. Are you supporting her?

A. No.

Q. Are you presently married?

A. No.

Q. Are you supporting your former wife?

A. No.

Q. Do you know how many members of your immediate family are in England or Canada?

A. No, I have no knowledge. Immediate members, I haven't corresponded with them. The last I heard was from my daughter. Aside from that I haven't heard from them at all for about twenty years.

Q. How old are you, Mr. Jay?

A. Sixty two—sixty three in January.

Q. You are almost sixty three?

A. Yes.

Q. Outside of your employment have you any assets?

A. No, I haven't now.

Q. Do you have any potential assets besides your employment?

A. No, I have some money owing me but I am having difficulty in collecting it. About the only asset I would have is continued employment.

Q. Do you have any idea, roughly, just what your total debts owing you are?

A. Somewhere around $700.

Q. So you might have potentially about $700 if all your debtors were to pay at one time?

A. Yes.

Q. Do you have any means of employment if you were to be returned to England?

A. No, I guess I would be taking a chance, at my age

arriving there and with nothing, I wouldn't have enough money to survive until I found something.

Q. You have no contact with any members of your family and they couldn't support you until you found work?

A. No, I don't know what their circumstances are.

[fol. 8] Q. Have you attempted to contact your family at all recently?

A. No, I don't know where my father and mother is.

Q. In other words, if you were to be deported to England, you have no assurance whatsoever that you would have any support?

A. No.

Q. Are you covered by Social Security here or not?

A. Well, I have been paying on a Social Security number since 1938.

Q. Other than your inability to assure that you will be able to support yourself, do you have any other reason why you would want your deportation suspended, why you feel it is a hardship?

A. In the first place, it is a hardship, I feel this is my country. I have lived here longer than in any any other country. All my friends are here, all my relatives, all my contacts and everything else. It is like cutting myself off entirely, I feel, just like I was going to a strange land, I would be lost. And secondly, if there is a possibility of it, I would like to be able to stay here long enough to get some assets so I could at least go to Canada. Maybe I would be able to survive in Canada. I served in the Canadian Army, never missed any of their battles. I think I might be entitled.

Q. Are you a citizen of Canada?

A. I presume I am, I don't know. They didn't have what you call citizenship there. I voted there, was an official and everything else; voted in the army too, of course.

Q. Do you have any desire to become a citizen of the United States?

A. Yes, that is what I am wanting.

Q. Have you made application previous to this?

A. I made several applications and each one was returned and I have been discouraged in some way or other, so I get discouraged; and the first thing I found out they didn't have a record of my second entry.

Q. The entry from Canada in 1921?

A. Yes, they didn't have any record. I know I was interrogated and I presumed that they did take some record. I have served in the Allied Forces and the president's proclamation said I would be able to return here because I had resided here prior to the war. Those were the statements I made when I came over the line.

Q. In any event, the reason you were unable at that time to establish citizenship in the United States is that you couldn't establish your entrance?

A. Yes. I was picked up by the Immigration officers for being here illegally and after they looked into the matter they said I was here legally and I would be no longer molested. Now then, when I made a former application for citizenship—Speed Smith was then in charge of Immigration, and he said that the simplest way out would be—that they might have lost the record, but Speed Smith wanted me to go back to Vancouver and contact the American Consul and then he would let me come back free of any quota. I pointed out I would be losing my originally obtained residence.

[fol. 9] Q. What year was that?

A. In 1923 or 1924.

Q. In any event, if this deportation order is suspended, will you ask to obtain United States citizenship?

A. Yes. I don't see why I can't be allowed since I haven't had anything to do with the Communist Party for ten years.

Q. The only thing prohibiting your naturalization is this deportation order.

A. Yes. I was reinstated by the Immigration. It was just a matter of a ten minute interview on Pike Street and they looked up the record and said I was here legally. Then I got this question of citizenship when it came up, and I got a letter from Washington indicating the same thing, that it would simplify things if I would go back to the border and I would be free to come back free of any quota, but I still hesitated to do that because I would lose my residence which I had established.

By Special Inquiry Officer: Well, Mr. Jay, I think you have explained the situation. Frankly, it has no bearing

on this particular application now. Continue with your next question, if you have it, Counsel.

By Counsel to Respondent:

Q. I think I will summarize here. You have then, two reasons why your want your deportation order suspended: one, you have no assured means of support were you to be deported; and two, you are desirous of seeking citizenship if you are able to obtain suspension of deportation, is that correct?

A. Yes.

By Counsel: I don't think there is anything else at this time.

By Special Inquiry Officer to Examining Officer: You may examine, Mr. Needham.

By Examining Officer: I have a Federal Bureau of Investigation record No. 347 423 B, dated May 5, 1953 relating to Cecil Reginald Jay, and I will offer it into evidence.

By Counsel: No objection.

By Special Inquiry Officer: This FBI record No. 347 423 B relative to the respondent will be received in evidence as *Reopened Exhibit 1.*

By Examining Officer to Respondent:

Q. Mr. Jay, how many times have you been married?

A. Twice.

Q. Are both your first and second wife living?

A. Well, I don't know about the first one. The second one is.

[fol. 40] Q. Where is your second wife living?

A. She is living in Tacoma now.

Q. Is she divorced from you?

A. Yes.

Q. When did the divorce occur, approximately?

A. January, 1950 or 1951.

By Special Inquiry Officer to Respondent:

Q. Was it before or after you had your last hearing here?

A. It was before.

Q. So it would be 1950, because the last time you appeared here was December 14, 1950.

By Examining Officer to Respondent:

Q. Do you contribute in any way to the support of your ex-wife?

A. No.

Q. What is your present salary?

A. Well, it is figured I get $75 a month plus an apartment.

Q. That is your total income?

A. Yes. Of course, it was one of the conditions of the original owner I was to have my afternoons free to do something else.

Q. As I understand your previous testimony, you have no-one dependent upon you for support in this country or any country?

A. No, that's right.

Q. Are you in good health, Mr. Jay?

A. I expect so.

Q. Is anything wrong physically with you, are you disabled in any manner?

A. No, I don't know of anything.

Q. As far as you know, you are in good health?

A. Yes.

Q. I believe you have testified that you had last entered the United States during the fall of about 1921, is that correct?

A. Yes.

Q. Since that date have you been physically present continuously in the United States?

A. Continuously, yes.

Q. You also stated that your membership in the Communist Party terminated about 1940 or 1941, is that correct?

A. Yes.

[fol. 11] Q. At any time within the last ten years have you been a member of the Communist Party?

A. No, I have not.

Q. Have you been a member of any other organization during that period that you haven't named this morning?

A. I can't recall of any. Yes, I belong to the National Association of Housing Officials. I forgot to put that in.

Q. Have you contributed any money to the support of the Communist Party during the last ten years?

A. No, I have not.

Q. Are you a subscriber to the Daily Worker?

A. No.

Q. Are you a subscriber to the People's World?

A. No, I never have been a subscriber to them.

Q. You were employed by the Seattle Housing Authority at Duwamish Building Project from June, 1941 to December, 1950, is that correct?

A. Yes.

Q. During your employment there did you ever distribute among the housing project any literature of any nature?

A. No, I have not.

Q. During the last ten years have you ever solicited anyone to join the Communist Party?

A. No.

Q. Mr. Jay, you have testified as to the hardship you thought that would be your part if you were deported to England. Do you wish to make any further statement as to why you think your deportation would be an extreme and unusual hardship?

A. Well, I think it is an unusual hardship to impose on a person when most of his life he has been in the country and then when he reaches the age of sixty he is shipped out to a country that he hasn't been associated with for thirty or forty years. I haven't had anything to do with England since about 1912. I would have to ask the British government to support me and I can't feel anything else but apprehension of that prospect, landing there with no assets.

By Examining Officer: I have no further questions.

By Special Inquiry Officer: Is the government prepared at this time to submit a report of an independent character investigation conducted relative to the character and residence of the respondent for the past ten years?

By Examining Officer: The government is not prepared at this time to submit a report of investigation. However, I will stipulate that such report, if favorable to the respondent, may be entered on the record without reopening the hearing, if agreeable with counsel for the respondent.

[fol. 12] By Counsel: That is agreeable.

By Special Inquiry Officer: Then upon receipt of independent investigation to be conducted by this Service rela-

tive to the respondent's residence and character for the past ten years, such will be received in evidence as *Reopened Exhibit 2*, with the understanding that anything derogatory contained therein, that respondent will be given an opportunity to examine it and refute if for the record if he so desires.

By Counsel: Fine.

By Counsel to Respondent:

Q. Mr. Jay, you were asked about whether you had ever distributed literature of any nature working for the housing project. I want to make sure there is no confusion. Is it possible that you would have distributed literature for the housing project? The housing project distributes leaflets or pamphlets on how to keep up the apartment, etc.?

A. I have done that. I have printed things, I don't know whether I distributed them or not, but at one time they were uncertain how to take care of their ranges, and things like that. I might have given it to somebody else, but I don't call it distribution.

Q. What you mean, you haven't gone from door to door distributing?

A. No, they have asked me to, but I have refused.

By Counsel: No further questions.

By Examining Officer: No further questions.

By Special Inquiry Officer to Respondent:

Q. You are advised that when all the stipulated documents have been received, I will prepare my decision and such will be served upon your attorney by registered mail, and you will be given a period of time, not to exceed ten business days within which to file an appeal thereto, if you so desire. Do you understand?

A. Yes. May I say something in answer to that? There is a matter of physical infirmity. I have found out I have a hernia and I have to have an operation.

Q. Do you have any further evidence to present in support of your application?

A. No.

I certify that the foregoing is a true and correct transcript of the testimony taken by me in the above entitled case.

Joseph H. Ramquist, Shorthand Reporter. Notes recorded in Book 1098.

I certify that to the best of my knowledge and belief this record is a true report of everything stated during the course of the hearing, including oaths administered, except statements made off the record.

David S. Caldwell, Special Inquiry Officer.

[fol. 13] RESPONDENT'S EXHIBIT "B"

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
SEATTLE DISTRICT

File No. ——

Affidavit of Witness in Application for Relief from Deportation Proceedings

In the Matter of the Application of Cecil A. Jay for suspension of deportation or departure at own expense in lieu of deportation under the provisions of Section 19(c) of the Immigration Act of February 5, 1917, as amended by the Act of June 28, 1940.

AFFIDAVIT

STATE OF WASHINGTON,
County of King, ss.

Ray C. Roberts, occupation Business, residing at 5030 19th Ave. NE, Seattle, Wash., being duly sworn, deposes and says: That he (is) a citizen of the United States; that he has personally known and been acquainted in a (business) (social) way with the applicant above mentioned; and that to (his) personal knowledge the applicant has resided at the following places: Seattle, Wash., from Jan. 1934 to Nov. 1953.

That to (his) personal knowledge the applicant (has)

conducted himself as a person of good moral character during the time of the above-mentioned residence; and that the applicant (is) attached to the principles of the Constitution of the United States and (has not) been engaged in subversive activities.

Ray C. Roberts.

Subscribed and sworn to before me this 20 day of November, 1953, at Seattle, Washington.

(Seal)

I. H. Evers, Notary Public in and for the State of Washington, residing at Seattle.

[fol. 14] RESPONDENT'S EXHIBIT "C"

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
SEATTLE DISTRICT

File No. —

Affidavit of Witness in Application for Relief from Deportation Proceedings

In the Matter of the Application of Cecil A. Jay for suspension of deportation or departure at own expense in lieu of deportation under the provisions of Section 19(c) of the Immigration Act of February 5, 1917, as amended by the Act of June 28, 1940.

AFFIDAVIT

STATE OF WASHINGTON,
County of King, ss.

Rolla V. Houghton, occupation Attorney at Law, residing at 4672 Eastern Avenue, Seattle, Washington, being duly sworn, deposes and says: That he (is) a citizen of the United States; that he has personally known and been acquainted in a (social) way with the applicant above mentioned; and that to (his) personal knowledge the ap-

plicant has resided at the following place: Seattle, Washington, from July, 1934 to November, 1953.

That to (his) personal knowledge the applicant (has) conducted himself as a person of good moral character during the time of the above-mentioned residence; and that the applicant (is) attached to the principles of the Constitution of the United States and (has not) been engaged in subversive activities.

Rolla V. Houghton.

Subscribed and sworn to before me this 20 day of November, 1953, at Seattle, Washington.

(Seal)

M. H. Van Nuys, Notary Public in and for the State of Washington, residing at Seattle.

[fol. 15] Respondent's Exhibit "D"

Seattle Housing Authority
825 Yesler Way, Seattle 4, Washington

Telephone ELiot 0750

The Rt. Rev. Stephen F. Bayne, Jr., Chairman; Charles W. Doyle, Vice-Chairman; Mariel Mawer; Kenneth J. Morford; Irvine B. Rabel; Charles W. Ross, Executive Director.

Affidavit

I, J. R. Adams, the Assistant Executive Director of the Seattle Housing Authority, 825 Yesler Way, Seattle 4, Washington, hereinafter referred to as the Authority, submit the following affidavit pertaining to the employment of Cecil R. Jay, now residing at 1633 Boylston Avenue, Seattle 22, Washington.

Mr. Jay was employed by this Authority as a Maintenance Laborer on June 16, 1944 at the monthly rate of $162.58. He was employed continuously from the aforementioned date to December 28, 1950, at which time he was removed from the payroll and placed on leave without pay pending the

clarification of his citizenship status. Said action was mandatory under the personnel policies of this Authority which require citizenship for all permanent employees.

During the period from 1944 through 1950, Mr. Jay was progressively assigned to positions of greater responsibility and, at the termination of his employment, held the position of Project Foreman at our largest project consisting of 1,300 apartments. He was responsible for the supervision of the work program and the direction of the activities of a large crew of men. His rate of pay was $1.78 per hour or approximately $308.50 per month without overtime. Within his period of employment with this Authority, he received seven increases in salary.

Mr. Jay was rated as one of the most conscientious and faithful employees of this Authority. His honesty was unquestioned. His interest in his work extended beyond the normal working hours and he was always willing to accept additional responsibilities without additional compensation. He was forthright in his opinions. His general moral character is evidenced by the fact that during his entire period of employment not one complaint was ever received from either the tenants or his fellow employees as to his relationships with people.

J. R. Adams, Asst. Executive Director.

Subscribed and sworn to before me this 6th day of November, 1953.

W. McIlraith, Notary Public in and for the State of Washington residing at Seattle.

[fol. 16] UNITED STATES DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

February 3, 1954

DECISION OF SPECIAL INQUIRY OFFICER

Application: Suspension of deportation pursuant to Section 244(a)(5) of Immigration and Nationality Act.

Detention Status: Released on bond.

Warrant of Arrest Served: July 18, 1949.

Discussion: This record relates to a 63 year old divorced male, a native of England and subject of Great Britain, who last entered the United States at Seattle, Washington in the fall of 1921. That entry has not been verified. He has testified that he was a voluntary member of the Communist Party of the United States from 1935 through 1940, during which time he held various offices in the Communist Party, such as literature agent and district organizer. The foregoing facts clearly render respondent deportable under the terms of the Act of October 16, 1918, as amended, on the charge lodged during the course of the hearing. In view of this finding no consideration is being given to the charges contained in the warrant of arrest.

Respondent has applied for the privilege of suspension of deportation under Section 244(a)(5) of the Immigration and Nationality Act. As the respondent has not been found to have been a Communist Party member later than 1940, it follows that more than ten years has elapsed since the assumption of the status which constitutes the ground for his deportation. Evidence of record, consisting of affidavits of persons well acquainted with the respondent, together with employment records, as well as a report of an investigation [fol. 17] by this Service, satisfactorily establishes that he has been physically present in the United States for a continuous period of not less than ten years last past. A check of the local and Federal records reveals no criminal record. An independent character investigation, as well as the above related affidavits tend to establish that for the ten years

immediately preceding his application for relief, he has been a person of good moral character.

Respondent has no one dependent upon him for support. To his knowledge he has no near relatives in the United States. He is presently employed as an apartment house manager, receiving $75.00 a month and an apartment. He estimates his assets to be $50.00 in cash and debts owed him in the approximate sum of $700 if all his debtors would pay up. He has stated that if he were deported he would suffer extreme and unusual hardship in that he would be separated from relatives and friends, and in effect that he would find it almost impossible to maintain himself because of lack of funds. On the record, respondent appears to be qualified for suspension of deportation. However, after considering confidential information relating to the respondent, as is provided for under 8 CFR 244.3, it is concluded that the respondent's case does not warrant favorable action and that his application for suspension of deportation be denied.

Findings of Fact: Upon the basis of all the evidence presented it is found:

(1) That the respondent is an alien, a native of England and subject of Great Britain;

(2) That the respondent last entered the United States at Seattle, Washington during the fall of 1921;

(3) That from 1935 through 1940 respondent was a voluntary member of the Communist Party of the United States.

Conclusion of Law: Upon the basis of the foregoing findings of fact, it is concluded:

That under the Act of October 16, 1918, as amended, respondent is subject to deportation in that he was, after entry, a member of the following class set forth in Section 1 of said Act: An Alien who was a member of the Communist Party of the United States.

Order: It is ordered that the alien be deported from the United States in the manner provided by law on the following lodged charge:

The Act of October 16, 1918, as amended, in that he was, after entry, a member of the following class set

forth in Section 1 of said Act: An alien who was a member of the Communist Party of the United States.

David S. Caldwell, Special Inquiry Officer.

[fol. 18] U. S. Department of Justice

Board of Immigration Appeals

Decision of Board of Immigration Appeals—April 9, 1954

File: E-953646—Seattle (A-3444079).

In re: Cecil Reginald Jay.

In Deportation Proceedings.

In Behalf of Respondent: John Caughlan, Esq., 702 Lowman Building, Seattle 4, Washington. (Brief filed.)

Charges:

Warrant: Act of October 16, 1918, as amended—After entry, alien member of organization that advocates or teaches overthow, by force or violence, of Government of United States.

Act of October 16, 1918, as amended—After entry, alien member of organization that distributes, etc., printed matter advocating overthrow, by force or violence, of Government of United States.

Lodged: Act of October 16, 1918, as amended—After entry, alien who was member of Communist Party of United States.

Application: Suspension of deportation—Section 244(a)(5) of the Immigration and Nationality Act of 1952.

Detention Status: Released on bond.

The case comes forward on appeal from the order of the special inquiry officer dated February 3, 1954, finding the alien subject to deportation on the charge lodged during the course of the hearing, denying discretionary relief of suspension of deportation, and directing that he be deported pursuant to law.

[fol. 19] The record relates to a native of England, subject

of Great Britain, 63 years old, male, who last entered the United States at the port of Seattle, Washington during the fall of 1924. This entry has not been verified. The evidence establishes that the respondent was a voluntary member of the Communist Party of the United States from 1935 to 1940, during which time he held various offices in the Communist Party, such as Literature Agent and District Organizer. The evidence fully establishes deportability upon the charge lodged during the course of the hearing.

Counsel in his brief argues that the respondent is not constitutionally subject to deportation. The question of the constitutionality of the Congressional enactments is not one for this Board to consider but is a matter for determination by the courts. The courts have sustained grounds of deportability based upon membership in the Communist Party subsequent to entry[1].

The respondent has applied for the privilege of suspension of deportation under Section 244(a)(5) of the Immigration and Nationality Act. The respondent has resided in the United States since 1921 and the record shows membership in the Communist Party from 1935 through 1940. He is employed as an apartment house manager, receiving $75 a month and an apartment for himself. He appears to have no dependent relatives in the United States.

The special inquiry officer has denied the discretionary relief of suspension of deportation on the basis of confidential information considered in accordance with the provisions of 8 C. F. R. 244.3. This regulation provides that in the case of an alien qualifying for voluntary departure or suspension of deportation under the Immigration and Nationality Act, the determination as to whether the application for suspension of deportation shall be granted or denied (whether such determination is made initially or on appeal) may be predicated upon confidential information without the disclosure thereof to the applicant, if in the opinion of the officer or the Board making the determination the disclosure of such information would be prejudicial to the public interest, safety, or security. These regulations

---

[1] *Harisiades* v. *Shaughnessy*, 342 U. S. 580; *Martinez* v. *Neelly*, 197 F. 2d 462; *Latvia* v. *Nicolls*, 106 F. Supp. 658.

would appear to be a sufficient answer to counsel's contention that the denial of discretionary relief must be based solely upon matter of record.

Suspension of deportation is not a matter of right on the part of the alien, but an act of grace on the part of the Attorney General and even without the authority of regulations, resort might be had to confidential information as a basis for denial of discretionary authority. Thus the case of *U. S. ex rel. Matranga* v. *Mackey*,[2] the appellant alleged [fol. 20] he was denied due process because, in refusing to suspend deportation, the Attorney General relied in part upon confidential information. The court held, that since it was used only for its bearing on the formulation of a discretionary decision, precedents barred relief, citing *United States ex rel. James v. Shaughnessy*, 202 F. 2d 519; *United States ex rel. Kaloudis* v. *Shaughnessy*, 180 F. 2d 489; *United States ex rel. Adel* v. *Shaughnessy*, 183 F. 2d 371. The court further stated that the Attorney General, in making a discretionary determination, may consider confidential information; that there was nothing to the contrary in the regulations. There is no requirement on the part of the special inquiry officer that he specifically find that in his opinion the disclosure of the confidential information would be prejudicial to the public interest, safety, or security, as long as he finds that in point of fact such is the situation.

Upon a full consideration of the evidence of record and in light of the confidential information available, it is concluded that the alien is not entitled to discretionary relief.

Order: It is ordered that the appeal be and the same is hereby dismissed.

Thos. S. Funicane, Chairman.

---

[2] 210 F. 2d 160 (C. A. 2, Feb. 4, 1954).

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 503

CECIL REGINALD JAY,

Petitioner

vs.

JOHN P. BOYD, District Director,
Immigration and Naturalization Service

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF PETITIONER

NORMAN LEONARD,
JOHN CAUGHLAN,
Attorneys for Petitioner,
702 Lowman Building,

INDEX

Table of Cases

STATUTES

REGULATIONS

MISCELLANEOUS

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 503

CECIL REGINALD JAY,

Petitioner

vs.

JOHN P. BOYD, District Director,
Immigration and Naturalization Service

BRIEF OF PETITIONER

Opinions Below

There was no written opinion in the District Court. The original *per curiam* opinion of the Court of Appeals (R. 25-26) is reported at 222 F. 2d 820. The *per curiam* opinion on petition for rehearing (R. 27-28) is reported at 224 F. 2d 957.

Jurisdiction

The judgment of the Court of Appeals was entered on May 10, 1955 (R. 26), and the petition for rehearing was denied on August 4, 1955 (R. 27-28). The petition for writ of certiorari was filed on November 2, 1955. Certiorari

was granted January 9, 1956 (R. 28). The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1).

Questions Presented

(Petitioner adopts the following questions set forth in the brief of the American Jewish Congress as *Amicus Curiae*, at p. 4.)

1. Whether the Attorney General, having by regulation established hearing procedures authorizing a special inquiry officer of the Service to determine whether a deportable alien should receive the discretionary relief of suspension of deportation, may vitiate such hearing by allowing such officer to deny such relief to an alien, otherwise qualified for it, solely and exclusively on the basis of "confidential information," not of record, the source, nature and details of which are not disclosed to the alien.

2. Whether a decision of a special inquiry officer denying an application for suspension of deportation should be set aside and a new determination required where the decision, in violation of a regulation promulgated by the Attorney General having the force of law, does not contain a statement of "the reasons for granting or denying such application."

Statute and Regulation Involved

Sections 244 (a) (5) and 244 (c) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 214-216; 8 U.S.C. 1254 (a) (5) and 1254 (c), provide:

> Sec. 244 (a). As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who—
>
> . . . . . .

(5) is deportable under paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17) or (18) of section 241 (a) for an act committed or status acquired subsequent to such entry into the United States, or having last entered the United States within two years prior to, or at any time after the date of enactment of this Act, is deportable under paragraph (2) of section 241 (a) as a person who has remained longer in the United States than the period for which he was admitted; has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this Act in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence.

* * * * * * *

(c) Upon application by any alien who is found by the Attorney General to meet the requirements of paragraph (4) or (5) of subsection (2) of this section, the Attorney General may in his discretion suspend deportation of such alien. If the deportation of any alien is suspended under the provisions of this subsection, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be

reported to the Congress with the reasons for such suspension. Such reports shall be submitted on the first and fifteenth day of each calendar month in which Congress is in session. If during the session of the Congress at which a case is reported, or, prior to the close of the session of the Congress next following the session at which a case is reported, the Congress passes a concurrent resolution stating in substance that it favors the suspension of such deportation, the Attorney General shall cancel deportation proceedings. If within the time above specified the Congress does not pass such a concurrent resolution, or if either the Senate or House of Representatives passes a resolution stating in substance that it does not favor the suspension of the deportation of such alien, the Attorney General shall thereupon deport such alien in the manner provided by law.

8 C. F. R. 244.3, promulgated December 17, 1952, 17 F. R. 11517, provides:

Sec. 244.3 *Use of confidential information.* In the case of an alien qualified for voluntary departure or suspension of deportation under section 242 or 244 of the Immigration and Nationality Act the determination as to whether the application for voluntary departure or suspension of deportation shall be *granted* or *denied* (whether such determination is made initially or on appeal) may be predicated upon confidential information without the disclosure thereof to the applicant, if in the opinion of the officer or the Board making the determination the disclosure of such information would be prejudicial to the public interest, safety, or security.[1]

[1] The regulations providing for the hearings on suspension of deportation, 8 C.F.R. 244.2, 242.54 (d) and 242.61 (a) are set forth in the appendix to this brief.

Statement of the Case

Petitioner is a sixty-five-year-old native of England who first came to the United States from Canada in 1914. In 1915 he enlisted in the Canadian Army, with which he served in France and Belgium during the First World War (R. 33). He reentered the United States in October, 1921, and since then has resided continuously in this country (R. 34) without having become a citizen (R. 16). In 1952, following an administrative hearing, he was ordered deported on the ground of his membership in the Communist Party between 1935 and 1940 (R. 47).

Thereafter he applied for suspension of deportation under provisions of the Immigration and Nationality Act of 1952, which for the first time authorized suspension in cases such as his.

Pursuant to the regulations established by the Attorney General (R. 13), a hearing was held before a special inquiry officer, at which petitioner presented evidence of his eligibility for the relief afforded by the statute and his general circumstances, which would bear upon the question of whether a suspension of deportation should be granted (R. 25-46). Petitioner testified in his own behalf and offered statements as to his good moral character and attachment to the principles of the Constitution and his dissociation from any subversive activities from a Seattle businessman (R. 43-44), a Seattle attorney (R. 44-45), and from the Assistant Executive Director of the Seattle Housing Authority where he had been employed from 1944 to 1950 (R. 45-46). No documentary information concerning petitioner was offered by the government at the hearing. Petitioner was advised by the special inquiry officer that if anything derogatory was contained in the report of an independent investigation conducted by the Service relative to the petitioner's character for the past ten years, peti-

tioner would be given an opportunity to examine it and to refute it for the record if he so desired (R. 41-42). Petitioner established at the hearing that he was qualified for suspension of deportation (R. 48). However, the special inquiry officer who conducted the hearing "after considering confidential information" which was not disclosed to petitioner, concluded that suspension of deportation should be denied (R. 48).

Petitioner appealed from this decision to the Board of Immigration Appeals upon the ground that denial of discretionary relief should be based solely upon matters of record (R. 51). Petitioner's appeal to the Board was dismissed (R. 51). He was taken into custody for deportation and on May 3, 1954, applied to the District Court for writ of *habeas corpus*, setting forth the matters which have just been outlined (R. 3-9). His application for *habeas corpus* was dismissed by the District Court and he appealed to the United States Court of Appeals in the Ninth Circuit, which affirmed the District Court, upholding the use of undisclosed confidential information not made a part of the record (R. 26, 28). This court granted certiorari (R. 28).

Summary of the Argument

I. A regulation which permits subordinate officers of the Immigration and Naturalization Service to decide applications for suspension of deportation on the basis of information received off the record is invalid. It would appear to conflict with explicit provisions of subsection (a) of Section 244 of the Immigration and Nationality Act of 1952 which affords an applicant the opportunity to prove his eligibility for suspension of deportation and the circumstances which may move an adjudicating officer to grant him the relief sought. It would also appear to conflict with provisions of subsections (b) and (c) of Section 244, requir-

ing that Congress, as the final arbiter in deportation cases, be furnished a complete and detailed statement of the facts and reasons in each case where suspension is to be recommended. Administration of each of these subsections would appear to require an administrative hearing.

A hearing, if required, must be a fair one. The determination of an application for suspension of deportation on the basis of "confidential information" received off the record violates the concept of fairness and vitiates the hearing procedure which the regulation purports to require. This is especially so since suspension of deportation is the only relief available to thousand of lawfully admitted, and to many long resident aliens otherwise mandatorily subjected to what may amount to lifelong banishment or exile. Such a power should never be implied in the absence of express language, for when Congress intended to authorize the use of non-record and confidential information (as in the case of exclusion procedures) it expressed such intent in explicit and appropriate words.

II. Petitioner adopts by reference the summary of argument and argument set forth in the brief of the American Jewish Congress as *Amicus Curiae*, Points II and III, pages 5-6, 21-29:

I

A Regulation by the Attorney General Which Authorizes the Decision on an Application for Suspension of Deportation to be Predicated Upon Confidential Information Received Off the Record and Not Disclosed to the Applicant Is Invalid.

A. *The challenged regulation is inconsistent with the statute authorizing suspension of deportation.*

Both the text and the history of Section 244 of the Immigration and Nationality Act of 1952, 8 U.S.C.A. 1254 (66 Stat. 214), would appear to indicate that a hearing

is required for administration of the section in accordance with Congressional intent.

While the section does not explicitly direct that the Attorney General or a subordinate administrative officer to whom he may delegate his power shall conduct hearing, it does require that an alien applying for suspension of deportation is required to *prove* the necessary qualifying elements and the circumstances of hardship affecting him which will establish his eligibility, and may move the adjudicating officer to favorable action in his behalf.

The pertinent language of subsection (2) paragraph (5) of Section 244 reads as follows:

> "The Attorney General may, in his discretion, suspend deportation . . . in the case of an alien who . . . is deportable [as having been, after entry, a member of one of the subversive classes described in Section 241 (a) (6) (8 U.S.C.A. 1251 (6)](a) . . . has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act or the assumption of a status constituting a ground for deportation, and proves that during all such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this chapter . . .; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien . . ." (8 U.S.C.A. Section 1254 (a) (5); words in brackets added)

Similar language, requiring proof by the alien of the factors qualifying him for suspension, is used in each of the first four paragraphs of the subsection, as well as in the fifth.

Since the alien must prove the factors necessary to qualify him for the relief sought, it would seem to be necessarily implied that some type of appropriate proceeding equivalent to a hearing must be provided by the Attorney General for this purpose.

The right to a fair hearing in conformity with prevailing regulations is, of course, firmly established. *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260. The provision for a hearing, however, is more than a mere act of grace since it would appear to be a necessary part of the execution of the expressed intent of Congress which requires that an opportunity be afforded the alien applicant to *prove* his good moral character, and the circumstances of exceptional and extremely unusual hardship affecting his case. The opportunity for proof implies not only the opportunity to present favorable facts and circumstances but likewise to rebut the unfavorable.[2]

The necessity of a hearing is also implicit in subsections (b) and (c) and section 244, each of which require "a complete and detailed statement of the facts and pertinent provisions of law in the case . . . [to] be reported to the Congress with the reasons for such suspension." Such a report is required in order to enable the Congress to

---

[2] The language just referred to had its origin in the Smith Act of June 28, 1940, Section 20; 8 U.S.C. 155 (c) (1946 ed.); 54 Stat. 671, 673, which states in part that "in the case of any alien . . . who is deportable and who has proved good moral character for the preceding five years, the Attorney General may . . . (2) suspend deportation of such alien . . . if he finds that such deportation would result in serious economic detriment to a citizen or legally resident alien who was the spouse, parent, or minor child of such deportable alien. . . ."

Regulations for the administration of this provision were first published in 1941 (6 F.R. 68, 70) and provided that in the course of the hearing where "the alien has applied or given notice of intention of applying for the privilege of . . . suspension of deportation . . . the presiding inspector shall inquire thoroughly into all questions relating to the alien's eligibility to the relief requested in so far as such inquiry is necessary to supplement the general information form."

perform the function which it reserved to itself under the two subsections, namely, to act as the final arbiter on whether deportation shall be suspended. Subsection (b) provides that if neither the Senate nor the House passes a resolution stating in substance that it does not favor the suspension of deportation, in the case of suspension proceedings under subparagraphs (1), (2), or (3), or subsection (a), deportation proceedings are to be cancelled. Subsection (c) provides that if the Senate and House of Representatives do not pass a concurrent resolution stating in substance that the Congress favors the suspension of deportation, or if either House does pass a resolution stating that it does not favor suspension of deportation, the Attorney General shall proceed to deport the alien as provided by law.

This section also has its origin in the Act of June 28, 1940.[3] Paragraphs (4) and (5) of subsection (a), section 244 of the Immigration and Nationality Act of 1952, extended the privilege of suspension of deportation to new classes of deportable aliens so that suspension is now available as relief in almost every deportation case.

House Report No. 1365, February 14, 1952, 82nd Congress, Second Session, to accompany H.R. 5678, discusses the sections just referred to in the following language:

---

[3] "* * * If the deportation of any alien is suspended under the provisions of this subsection for more than six months, all of the facts and pertinent provisions of law in the case shall be reported to the Congress within ten days after the beginning of its next regular session, with the reasons for such suspension. The clerk of the House shall have such report printed as a public document. If during that session the two Houses pass a concurrent resolution stating in substance that the Congress does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien in the manner provided by law. If during that session the two Houses do not pass such a resolution, the Attorney General shall cancel deportation proceedings upon the termination of such session . . . 8 U.S.C. (1946 ed.) Section 155 (c); 54 Stat. 673.

> "The Attorney General is required to report each case in which he suspends deportation under the [first] . . . three categories to the Congress and the adjustment of status would become final in the absence of adverse action either by the Senate or House of Representatives." * * * "The Attorney General is required to report each case in which he suspends deportation under the latter categories (4) and (5) to the Congress and the adjustment of status does not become effective unless Congress affirmatively approves the adjustment by a concurrent resolution, nor shall such an adjustment be effective if either the Senate or House of Representatives passes a resolution disapproving suspension." House Misc. Rep., Vol. I, Series 11575, 82nd Cong., 2nd Sess., page 62.

Paragraphs (1), (2) and (3) of subsection (a), Section 244 of the Act, are substantially similar in their operation to 8 U.S.C. (1946 ed.) Section 155(c). The requirement of affirmative action on the part of Congress in certain classes of cases constitutes a departure, though not a substantial one, from the procedure under the former section. Under both procedures Congress reserved to itself the right to act as the final arbiter in every suspension of deportation case.

Far from entrusting suspension of deportation solely to the discretion of the Attorney General, giving him a "dispensation akin to the power of executive clemency" as urged by the government,[4] Congress intended to and did carefully and explicitly divide the exercise of this function between the executive and the legislative branch of the government. To the Attorney General was delegated the investigative function, the preparation of the

[4] Brief for the respondent in opposition to petition for certiorari, page 9.

record for Congressional use, and the screening out of applicants obviously beyond the scope of the relief which Congress provided by this measure.

The statutory requirement of a "complete and detailed statement of facts" and the "reasons for" suspension action clearly implies that the Congress intended that the Immigration and Naturalization Service supply it with all pertinent information from the record whether favorable or unfavorable to the applicant in every case in which suspension was granted by the service. Congress could scarcely have used such sweeping language if it had intended to authorize decisions, favorable or unfavorable, to be made upon secret, "confidential information" not a part of the record. Yet, this is exactly what the regulation purports to authorize, for

> ". . . The determination as to whether the application for . . . suspension of deportation should be *granted* or denied . . . may be predicated upon confidential information . . ." (8 C.F.R. sec. 244.3) (emphasis added).

Thus the decision of the special inquiry officer or of the Board of Immigration Appeals on which Congress has reserved the final judgment may be predicated upon matters not made a part of the record in the case.

It is inconceivable that Congress could have intended that a record upon which its final determinative action would be based, or any summary of that record, should not contain the very matters upon which the special inquiry officer predicated his decision.[3]

[3] Congress might very well take a different view of a suspension case than was taken by the special inquiry officer, or the Board of Immigration Appeals. See, for example, H.R. Rep. No. 1458, 84th Congress, 1st Session, page 6, referring to the *Brancato* case, discussed on pages 11-13, brief of American Jewish Congress as amicus curiae.

The position here advanced, that the Congress had no intention of authorizing administrative decisions in suspension of deportation cases on the basis of undisclosed confidential information, finds further support in the fact that the twelve-year administrative history of suspension proceedings was before Congress during the debates on the Immigration and Nationality Act of 1952. No regulation authorizing the use of off-the-record information had ever been promulgated by the Attorney General prior to the passage of the 1952 Act.[6]

There was a considerable body of judicial precedent relating to the exercise of discretionary relief of suspension of deportation. It was well established that while the Attorney General's "exercise of discretion" was not reviewable as such, the courts would require the Attorney General to exercise discretion where he wrongfully or mistakenly refused to do so, *Mastrapasqua* v. *Shaughnessy*, (C.A. 2, 1950) 180 F. 2d 999; see *United States ex rel Weddeke* v. *Watkins*, (C.A. 2, 1948) 166 F. 2d 369, 372; *United States ex rel. Adel* v. *Shaughnessy*, 183 F. 2d 371, 372. It had been held that the decision of the suspension of deportation cases on non-record or confidential information was such a clear abuse of discretion: *Alexiou* v. *McGrath*, (D. C. 1951) 101 F. Supp. 421.[7] Congress, presumably aware of this admin-

---

[6] The 1941 regulation issued within six months after the passage of Section 20 of the Smith Act, see footnote 1, page 10, *supra*, remained in effect substantially unchanged until the adoption of the regulation here challenged which for the first time purported to authorize the use of off-the-record information.

[7] This case was decided prior to the enactment of the 1952 legislation. It has been followed, or a similar result has been reached, in a number of district court cases: *Maeztu* v. *Brownell*, (D.C. 1955) 132 F. Supp. 751; *Orahorats* v. *Brownell* (D.C. 1955) 134 F. Supp. 84; *Ex parte Mota Singh Chohan*, (N.D. Cal. 1954) 122 F. Supp. 851. All are to the effect that it is improper for a hearing officer or Board of Immigration Appeals to base his decision on an application for suspension of deportation solely on off-the-record or confidential information. All except the *Alexiou* case were decided after the passage of the 1952 Act and so, of course,

istrative history and judicial interpretation, chose to enact section 244 in language far more consistent with an intent to require that the decision of a suspension application be predicated solely on a "complete and detailed" record, than to authorize the use of off-the-record "confidential information".

This cannot be attributed to Congressional inability to express its intent, for "when Congress has the will it has no difficulty in expressing it". *Bell* v. *United States*, 349 U.S. 81, 83. For example, in section 235(c) of the 1952 Act, 8 U.S.C.A. sec. 1225(c), the Attorney General is specifically authorized to make a determination that an "alien is excludable . . . on the basis of information of a confidential nature". This may be done when "the Attorney General, in the exercise of his discretion, and after consultation with appropriate security agencies of the Government, concludes" that the disclosure of the information "would be prejudicial to the public interest, safety, or security." This explicit statutory authority is granted only in exclusion proceedings where the immigrant, seeking entry for the first time has no rights whatsoever, except such as Congress may see fit to grant him. *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537. The explicit statutory power delegated to the Attorney General in section 235(c)

---

could not have been considered by Congress. *Arakas* v. *Zimmerman*, 200 F. 2d 322, 324, was decided in 1952 after the passage of the 1952 act so that it could have had no direct bearing on the Congressional action. The court for the Third Circuit stated: "We agree entirely with the holding in *Alexiou* v. *McGrath* . . . ." and commented that the refusal to suspend deportation "on the basis of confidential information not part of the hearing record" was "serious error" on the part of the District Court. In *United States ex rel. Accardi* v. *Shaughnessy*, (C.A. 2, 1953) 206 F. 2d 897, the court referred with apparent approval to the *Alexiou* case and distinguished it on the ground that there "it affirmatively appeared that evidence not of record was considered" whereas in the case before the court "[t]he Board's opinion discussed only the evidence in the record, and such evidence was amply sufficient to support discretionary denial of suspension of deportation," (at p. 900).

of the Act was historically derived from the war time and national emergency powers granted in 22 U.S.C.A. 223, 55 Stat. 252, and from regulations expressly promulgated under this statutory authority. 8 C.F.R. 175.57(b), 10 F.R. 8995. In the *Knauff* case this court specifically held that the proclaimed national emergency under which the regulation was promulgated was still in existence. It was against this background that Congress enacted section 235(c) of the Act, with its limited application and somewhat restrictive language.

By contrast the power arrogated in the challenged regulation is broader in scope than the statutory power just discussed; it is delegated to a host of relatively minor departmental officers[8] rather than to a cabinet officer, and it is applied to persons who, as lawfully admitted resident aliens, are fully entitled to Constitutional protection of their substantive rights, *Bridges* v. *Wixon*, 326 U.S. 135, 161, and to procedural due process in the disposition of any discretionary relief which may be accorded them by Congress. *United States ex rel Accardi* v. *Shaughnessy*, 347 U.S. 260, 268. The claimed right of a special inquiry officer to decide an application for suspension of deportation solely on the basis of information received off the record renders any administrative hearing on the application purely illusory. Since the regulation nullifies any right of the alien applicant to a hearing, it conflicts with the intent of Congress and should be held to be invalid.

B. *The Attorney General does not have the implied power to authorize the determination of an application for suspension of deportation upon undisclosed "confidential information" not placed upon the record.*

Assuming that section 244 of the Act is not construed as explicitly requiring that a decision be based upon the record

[8] See Brief of Amicus Curiae, pp. 7-11.

in the case, can the regulation be justified as the exercise of an implied power?

It is settled that where "the fundamental rights of men are involved" the acts of Congress relating to aliens must be "administered, not arbitrarily and secretly, but fairly and openly, under the restraints of the tradition and principles of free government", and that a decision based upon information imparted to an adjudicating officer in secret is void. *Kwock Jan Fat* v. *White*, 253 U.S. 454, 464. While the decision in this case involves the exercise of discretionary power, as distinguished from the substantive determination of whether the alien falls within a deportable class in the first instance, the fair exercise of discretion is scarcely less important to the legislative scheme than the original determination of deportability.

In terms of the number of persons affected, its importance cannot be overemphasized. Deportability is contested in only about one fifth of deportation hearings.[9] In the remainder of cases suspension of deportation or voluntary departure, discretionary measures, are the only forms of relief available.[10]

The deportation laws are framed in terms of a mandate to the Attorney General that any alien in the United States who falls within any of the very numerous classes proscribed by Congress[11] "shall be deported." 8 U.S.C.A. 1251. Especially in cases involving charges of proscribed

---

[9] Task Force on Legal Services and Procedure, Report on Legal Services and Procedure, 272 (1955); cited by Maslow, Recasting our Deportation Law: Proposals for Reform, 56 Col. L. Rev. 309, 351.

[10] Petitioner in this case did not dispute the factual basis for the determination of deportability. It would appear from the record that he is being deported solely on his own statement that he was a member of the Communist Party between 1935 and 1940 (R. 47).

[11] It has been estimated that 700 different grounds of deportation may exist. Hearings Before the Senate Appropriations Committee on Department of Justice Appropriation for 1954, 83rd Cong. 1st Sess. 250 (1953), cited by Maslow, op. cit., 56 Col. L. Rev. 314.

political activity, persons may be deportable who, like the petitioner, have resided in this country longer than a majority of the native born.[12] The law may command the expulsion of an alien who was entirely ignorant of the fact that an organization to which she belonged in the remote past was committed to unlawful objectives, a manifestly harsh result where the membership was not proscribed when it occurred, and the deportable class has been defined retroactively. *Galvan v. Press*, 347 U.S. 521. Persons like petitioner who have long since abandoned the status which brought them within a deportable class and whose conduct has been unexceptionable for more than a decade would seem to fall within the orbit of Congressional intent as expressed in Section 244 and to be precisely those persons for whom the statute was designed.

The fact that the relief provided by the statute is discretionary does not mean that it can be exercised without a hearing. Although a matter may be explicitly committed to the Attorney General by statute and no express provision made for a hearing, the Attorney General will be required to justify a discretionary denial of bail pending deportation by showing on the basis of evidence adduced at a hearing for that purpose that his discretion was exercised in a manner consistent with legislative intent. *Carlson v. Lan-*

[12] Petitioner has continuously resided in the United States for 35 years. It has been 42 years since he first entered. Petitioner's case in this respect is typical of those who have been similarly charged. It has been estimated that in 1952 when Sec. 244 of the Act first made the relief here under consideration available to persons who had in the past been in a "subversive class", 63% of those so charged had resided in the United States 31 years or more. *Political Deportations in the United States*, 14 Lawyers Guild Rev., 93, 101. The computation, based in part upon material supplied at the request of Mr. Justice Frankfurter by the Immigration and Naturalization Service in connection with the consideration of *Carlson v. Landon*, 342 U.S. 524, referred to at p. 538, n. 34, shows the following as to the length of residence in the United States of 219 in political cases: Over 41 years in the United States, 18%; over 31 years, 63%; over 21 years, 96%; over 10 years, 98%. (Figures are cumulative.)

dan, 342 U.S. 534, 543. If the right to a hearing will be implied to determine whether the Attorney General's discretion has been exercised in accordance with the legislative scheme in such cases, it should likewise be implied where discretion with respect to deportation itself is involved.

In any event the Attorney General has provided for a hearing in Regulation 244.2. Having so provided, the hearing must be a fair one, for "it is now accepted that procedural due process must be observed in a hearing even though the alien is invoking relief which is, in any event, afforded only in official discretion." *United States ex rel. Giacalone* v. *Miller* (S.D.N.Y., 1949) 86 F. Supp. 655, 656-7.

Discretion exercised in secret is tantamount to a refusal to exercise discretion, or to an abuse of discretion, for, if a decision is made on the basis of matters not appearing of record, there is no way in which any court can determine whether discretion was exercised arbitrarily and capriciously or in a manner not consonant with the legislative intent. Irreparable damage is done, and the seeds of tyranny have been sown. See *Boudin* v. *Dulles* (DC, 1955) 136 F. Supp. 218.[13]

[13] cf. *Parker* v. *Lester* (C.A. 9, 1955), 227 F. 2d 708, where a panel of the Court of Appeals for the Ninth Circuit reversed a district court decision, 112 F. Supp. 433, and directed that officers of the United States Coast Guard be restrained from enforcing screening regulations against the plaintiff seamen. The regulations authorized an ex parte determination by the Commandant of the Coast Guard that certain seamen be excluded from access to the ships where they were employed, as a safety measure to protect waterfront facilities in times of national emergency. A "hearing" was granted to the seamen at which they purportedly had the opportunity to establish that the edict of the Commandant should not be applied to them. The regulations which were enjoined authorized hearing officers to predicate their decisions affecting the rights of the seamen to follow their employment upon confidential reports prepared by government security and investigative agencies, the contents of which were not disclosed to the seamen. Neither a confrontation of adverse witnesses nor a summary of the evidence, as in selective service

Regulation 244.3, which in effect permits decisions to be made without a hearing, is at variance with the intent of Congress as expressed in section 244 of the Immigration and Nationality Act of 1952. It is an attempted exercise of power which can not be implied from the statute, and which is inconsistent with the tradition and principles of a free government. The regulation is therefore void and proceedings taken under it are invalid. Petitioner's application for suspension of deportation should be remanded for determination on the evidence in the record.

Conclusion

On the basis of the foregoing, and argument set forth in points II and III of the Brief of the American Jewish Congress as *Amicus Curiae*, pages 21-29, it is respectfully submitted that the denial of petitioner's application for suspension of deportation should be set aside.

Respectfully submitted,

NORMAN LEONARD,
JOHN CAUGHLAN,
Attorneys for Petitioner.

April 18, 1956.

---

cases, cf. *United States* v. *Nugent*, 346 U.S. 1; was provided for. The Court quoted at length from the dissenting opinion of Mr. Justice Jackson in *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 225-227. The government obtained an extension of time within which to petition this Court for certiorari. According to the New York Times, March 25, 1956, page 1, it was decided not to file the petition for certiorari because it was believed that the action of the lower court would be sustained.

APPENDIX

Title 8, Code of Federal Regulations

Sec. 244.2 Suspension of Deportation.

An application for suspension of deportation shall be submitted in accordance with, and subject to, the provisions of Sec. 242.54 (d) of this chapter and shall be determined and disposed of in accordance with the provisions of this part and Sec. 242.61 of this chapter.

Sec. 242.54 (d) Application for discretionary relief:

Except in the case of an alien who is *prima facie* deportable under section 242 (f) of the Immigration and Nationality Act, 8 U. S. C. A. Sec. 1252 (f), at any time during the hearing the respondent may apply for suspension of deportation on Form I-256A or for voluntary departure, under section 244 of the said Act (8 U. S. C. A. Sec. 1254). The burden of establishing that he meets the statutory requirements for discretionary relief shall be upon the respondent. He may submit any evidence in support of his application which he believes should be considered by the special inquiry officer.

Sec. 242.61 Decision of special inquiry officer—(a) Preparation of Written Decision.

Except as provided in paragraph (b) of this section and Sec. 242.76, the special inquiry officer shall, as soon as practicable after the conclusion of the hearing, prepare a written decision signed by him which shall set forth a summary of the evidence adduced and his findings of fact and conclusions of law as to deportability, unless such findings and conclusions are waived by the respondent orally during

the hearing or by written waiver filed with the special inquiry officer after the conclusion of the hearing. If the respondent has applied for discretionary relief in accordance with the provisions of Sec. 242.54 (d), the decision shall also contain a discussion of the evidence relating to the alien's eligibility for such relief and the reasons for granting or denying such application. The decision shall be concluded with the order of the special inquiry officer as provided in paragraph (c) of this section.

(8691-8)

No. 503

In the Supreme Court of the United States

OCTOBER TERM, 1955

CECIL REGINALD JAY, PETITIONER

v.

JOHN P. BOYD, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

SIMON E. SOBELOFF,
Solicitor General,
WARREN OLNEY III,
Assistant Attorney General,
BEATRICE ROSENBERG,
JOSEPH A. BARRY,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

CITATIONS

Cases:

368025—53

Statute:

Regulations:

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 503

CECIL REGINALD JAY, PETITIONER

v.

JOHN P. BOYD, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The original *per curiam* opinion of the Court of Appeals (R. 26–27; Pet. 13–14)[1] is reported at 222 F. 2d 820. The *per curiam* opinion on petition for rehearing (R. 30–31; Pet. 14–15) is reported at 224 F. 2d 957. The District Court's findings of fact and conclusions of law (R. 15–18) have not been reported.

[1] The record references are designated "R"; references to Exhibit A, constituting records of the Immigration and Naturalization Service, lodged with this Court are designated "E."

JURISDICTION

The judgment of the Court of Appeals was entered on May 10, 1955 (R. 28), and a petition for rehearing was denied on August 4, 1955 (R. 30–31; Pet. 14–15). The petition for a writ of certiorari was filed on November 2, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

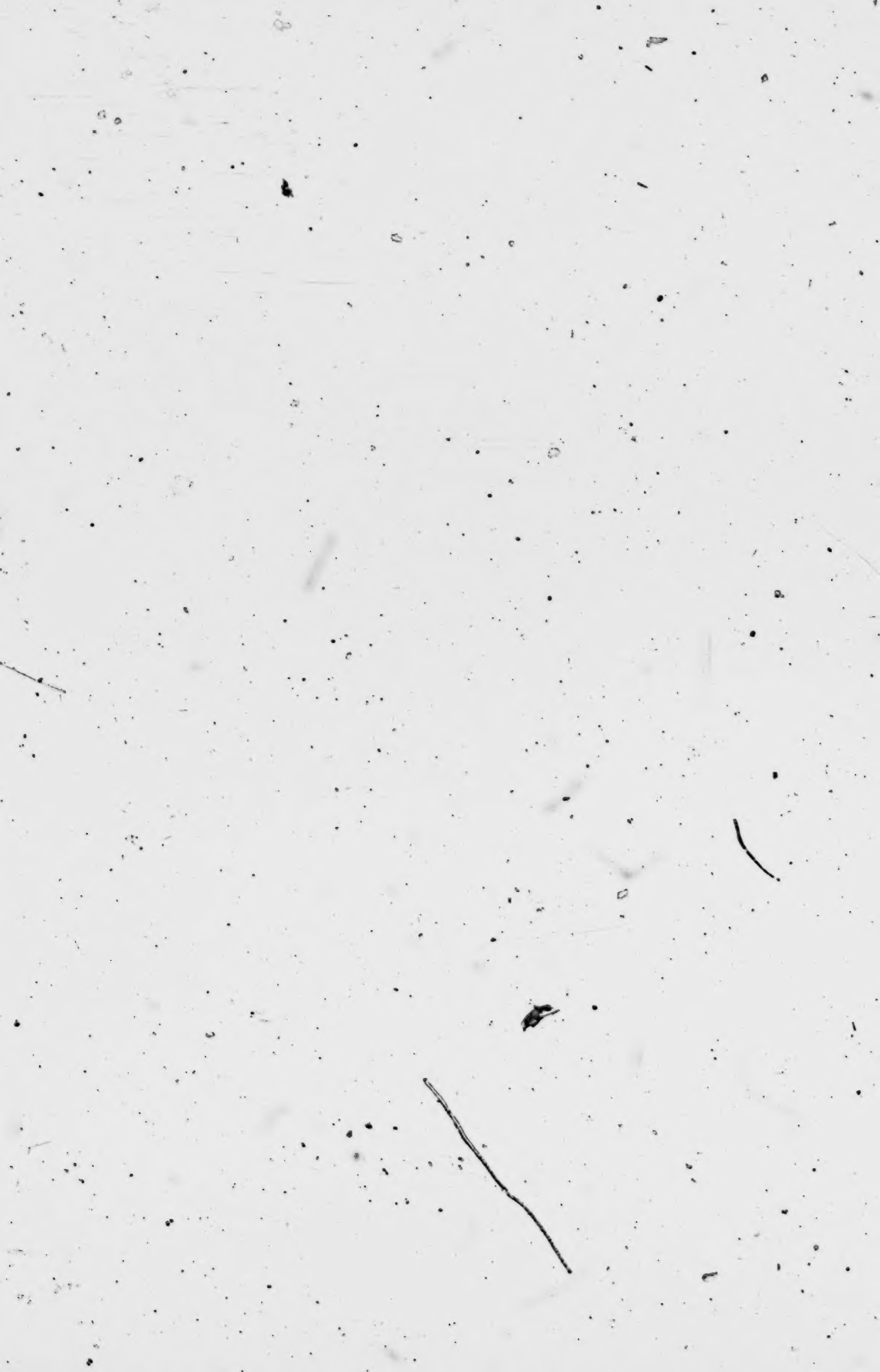
1. Whether the Attorney General's regulation, which permits consideration of confidential information in determining whether to grant to a deportable alien the discretionary relief of suspension of deportation, is valid.

2. Whether the hearing officer's reference to the applicable regulation was sufficient to show compliance therewith.

STATUTE AND REGULATION INVOLVED

Sections 244 (a) (5) and 244 (c) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 214–216; 8 U. S. C. 1254 (a) (5) and 1254 (c), provide:

> Sec. 244. (a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who—
>
> * * * * *
>
> (5) is deportable under paragraph (4), (5), (6), (7), (11), (12), (14),



(15), (16), (17) or (18) of section 241 (a) for an act committed or status acquired subsequent to such entry into the United States or having last entered the United States within two years prior to, or at any time after the date of enactment of this Act, is deportable under paragraph (2) of section 241 (a) as a person who has remained longer in the United States than the period for which he was admitted; has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this Act in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence.

* * * * *

(e) Upon application by any alien who is found by the Attorney General to meet the

requirements of paragraph (4) or (5) of subsection (a) of this section, the Attorney General may in his discretion suspend deportation of such alien. If the deportation of any alien is suspended under the provisions of this subsection, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension. Such reports shall be submitted on the first and fifteenth day of each calendar month in which Congress is in session. If during the session of the Congress at which a case is reported, or, prior to the close of the session of the Congress next following the session at which a case is reported, the Congress passes a concurrent resolution stating in substance that it favors the suspension of such deportation, the Attorney General shall cancel deportation proceedings. If within the time above specified the Congress does not pass such a concurrent resolution, or if either the Senate or House of Representatives passes a resolution stating in substance that it does not favor the suspension of the deportation of such alien, the Attorney General shall thereupon deport such alien in the manner provided by law.

8 C. F. R. 244.3, promulgated December 17, 1952, 17 F. R. 11517, provides:

§ 244.3 *Use of confidential information.* In the case of an alien qualified for voluntary departure or suspension of deportation

under section 242 or 244 of the Immigration and Nationality Act the determination as to whether the application for voluntary departure or suspension of deportation shall be granted or denied (whether such determination is made initially or on appeal) may be predicated upon confidential information without the disclosure thereof to the applicant, if in the opinion of the officer or the Board making the determination the disclosure of such information would be prejudicial to the public interest, safety, or security.

STATEMENT

Petitioner is a 64-year-old native of England (R. 16). He has resided in the United States since 1921 without acquiring United States citizenship (R. 12, 16). His deportation has been ordered as an alien who, by his own admission, had been a voluntary member of the Communist Party between 1935 and 1940 (R. 12, 16; E. 3, 30). Petitioner thereupon applied for discretionary relief suspending deportation (R. 16). This application was denied on the basis, *inter alia*, of confidential information which had been used pursuant to regulation 8 C. F. R. 244.3 (*supra*, pp. 4–5) (R. 16). Petitioner then brought habeas corpus proceedings in the United States District Court for the Western District of Washington, asserting that the use of confidential information vitiated the refusal to grant him the requested discretionary relief (R. 3–9). The District Court,

following a hearing dismissed the habeas corpus petition, finding that the confidential information had been properly used (R. 17–19). The Court of Appeals affirmed (R. 28).

1. The deportation proceedings.

In July 1949, petitioner was charged with being illegally in the United States, under the Act of October 15, 1918, as amended. Subsequently, under the Internal Security Act amendments of 1950, 64 Stat. 987, 1006, 8 U. S. C. (1946 ed. Supp. V) 137, *et seq.*, a further charge was lodged against petitioner, that he was deportable as an alien who had been a member of the Communist Party after entry into the United States (R. 12, 16). A special inquiry officer found him to be deportable under the lodged charge, and on December 5, 1952, the Board of Immigration Appeals affirmed (*ibid.*). Petitioner does not challenge the fairness of these deportation hearings (R. 16).

On June 30, 1953, petitioner filed a motion with the Board of Immigration Appeals to reopen his case to allow him to apply for suspension of deportation under Section 244 (a) (5) of the Immigration and Nationality Act (*supra*, pp. 2–3) (R. 13). On August 3, 1953, the Board directed that the order of deportation be withdrawn to allow petitioner to file his application (R. 13; E. 31). On November 25, 1953, petitioner filed his application (R. 13, 16; E. 46). Following a

hearing at which petitioner was represented by counsel, the special inquiry officer filed a written decision which stated (R. 16–17; E. 30): "On the record, respondent appears to be qualified for suspension of deportation. However, after considering confidential information relating to the respondent, as is provided for under 8 CFR 244.3, it is concluded that the respondent's case does not warrant favorable action and that his application for suspension of deportation be denied." On appeal to the Board of Immigration Appeals (R. 17; E. 27), the Board affirmed in a written opinion stating that "in light of the confidential information available, it is concluded that the alien is not entitled to discretionary relief" (R. 17; E. 4).

2. The habeas corpus proceedings.

After he had been notified to report for deportation, petitioner attempted to challenge the determination on his application for discretionary relief by petitioning the District Court for a writ of habeas corpus (R. 3–9).[2] In this petition he alleged "upon information and belief" that the confidential information mentioned in the order was the fact that the American Committee for the Protection of the Foreign Born issued a list

[2] The return to the writ of habeas corpus states (R. 12) that a prior application for a writ of habeas corpus was made before the application for suspension of deportation, and that its denial by the District Court was not appealed.

of persons against whom deportation proceedings were pending and solicited support of these persons, that petitioner's name was included on this list, that the Committee had been characterized by the Attorney General as a subversive organization, and that this Attorney General's list had been circulated among the employees of the Immigration Service and the Board of Immigration Appeals (R. 7). The government's return to the writ denied this (R. 14). The District Court made findings of fact and conclusions of law, holding, *inter alia,* that the special inquiry officer and the Board of Immigration Appeals exercised their independent judgment in denying discretionary relief (R. 17), and that the Attorney General may, after complying with all the essentials of due process of law in the deportation hearing and in the hearing to determine eligibility for suspension of deportation, consider confidential information in forming his decision (R. 18). The Court of Appeals unanimously affirmed *per curiam,* holding that petitioner's challenge was "wholly without merit" (R. 26–27, 30–31; Pet. 13–15).

ARGUMENT

Petitioner alleges no unfairness with respect to the hearing at which he was found deportable. His complaint is that in his application for the discretionary relief of suspension of deportation he was treated unfairly in that the denial was based on confidential information.

1. In Section 244 (c) of the Immigration and Nationality Act (*supra*, pp. 3–4), Congress granted the Attorney General the unrestricted power "in his discretion [to] suspend deportation", without in any way limiting or defining the manner in which this power is to be exercised. Congress at once provided the broadest possible latitude for the exercise of this discretion, and the narrowest possible review. With respect to its exercise, the statute itself provides for no hearing on the application for suspension; it leaves the establishment of machinery for the exercise of discretion to the Attorney General. Congress chose to rely upon the informed judgment of a cabinet officer with recognized facilities for investigation and trusted him with a power of dispensation akin to the power of executive clemency.

So far as the statute is concerned, the Attorney General is wholly free, as is the President in the exercise of the pardoning power, to consider any information he deems relevant, from whatever source, in deciding whether an alien who meets the minimum requirements fixed by Congress is entitled to administrative grace. The courts have long recognized that the Attorney General's power with respect to such applications is an exercise of grace, with the decision unreviewable by the courts save where there is a failure to exercise any discretion. *United States ex rel. Accardi* v. *Shaughnessy*, 347 U. S. 260; *United*

States ex rel. James v. *Shaughnessy*, 202 F. 2d 519 (C. A. 2), certiorari denied, 345 U. S. 969; *Arakas* v. *Zimmerman*, 200 F. 2d 322 (C. A. 3); *United States ex rel. Adel* v. *Shaughnessy*, 183 F. 2d 371 (C. A. 2); *United States ex rel. Kaloudis* v. *Shaughnessy*, 180 F. 2d 489 (C. A. 2); *United States ex rel. Weddeke* v. *Watkins*, 166 F. 2d 369 (C. A. 2), certiorari denied, 333 U. S. 876.[3]

The Attorney General has set up by regulation a procedure for hearing on such applications (8 C. F. R. 244.2, 242.54 (d), 242.61) and he has specifically provided that the decision may be

---

[3] While providing no review where suspension is denied, Section 244 (c) provides: "If the deportation of any alien is suspended under the provisions of this subsection, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension." Following submission of such report Congress further provided in Section 244 (c) that the deportation should nonetheless be carried out unless before the close of the applicable session of Congress, a concurrent resolution is passed favoring suspension of deportation. The procedure prescribed in Section 244 (b) of the Act for review of decisions for suspension of deportation based on grounds specified in Sections 244 (a) (1) (2) and (3) shows a Congressional purpose to make more rigid the requirements for suspension of deportation in cases where deportation is based on grounds mentioned in Sections 244 (a) (4) and (5). As to the first three sections the decision in favor of suspension will be affirmed unless the Senate or House passes a resolution *against* suspension; as to subsection 5, under which petitioner was eligible for relief, the decision will not be affirmed unless Congress passes a joint resolution in favor of suspension.

based on confidential information (8 C. F. R. 244.3, *supra*, pp. 4–5). This limitation on the Attorney General's self-imposed hearing machinery is valid since the power exercised is one of grace, and not of quasi-judicial adjudication. The courts have specifically ruled that use of confidential information in such cases does not violate due process. *United States ex rel. Matranga* v. *Mackey*, 210 F. 2d 160 (C. A. 2), certiorari denied, 347 U. S. 967; cf. *United States ex rel. Dolenz* v. *Shaughnessy*, 206 F. 2d 392 (C. A. 2); *United States ex rel. von Kleczkowski* v. *Watkins*, 71 F. Supp. 429 (S. D. N. Y.).[4] In analogous situations involving matters of grace, or exercise of executive power, this Court has upheld the right to use confidential information as a basis for decision. *United States* v. *Nugent*, 346 U. S. 1; *Shaughnessy* v. *Mezei*, 345 U. S. 206; *Knauff* v. *Shaughnessy*, 338 U. S. 537.

2. Petitioner also contends (Pet. 8–10) that the hearing officer did not comply with the regulations because he did not state in so many words, in accordance with Regulation 244.3, that "disclosure of such information would be prejudicial to the

---

[4] *Alexiou* v. *McGrath*, 101 F. Supp. 421 (D. D. C.), and *Maetzu* v. *Brownell*, 132 F. Supp. 751 (D. D. C.), relied upon by petitioner (Pet. 8), arose under the old regulations which had no specific provision for use of confidential information. See also to the same effect *Orahovats* v. *Brownell*, 134 F. Supp. 84 (D. D. C.). Furthermore, the holdings in these cases are contrary to the decision in *Matranga* cited in the text.

public interest, safety, or security". As the court below held on petition for rehearing (R. 30–31; Pet. 14–15), the hearing officer's reference to consideration of "confidential information relating to the respondent, as is provided for under 8 CFR 244.3" (R. 30), shows that he had made the necessary determination that disclosure of the information would not be warranted. No particular words are necessary so long as the decision manifests that the regulation was in fact complied with and that a proper determination was made.

CONCLUSION

The case presents no conflict of decisions and is governed by established principles. It is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
JOSEPH A. BARRY,
Attorneys.

DECEMBER 1955.

U. S. GOVERNMENT PRINTING OFFICE, 1955

No. 503

In the Supreme Court of the United States

OCTOBER TERM, 1955

CECIL REGINALD JAY, PETITIONER

v.

JOHN P. BOYD, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

SIMON E. SOBELOFF,
Solicitor General,
WARREN OLNEY III,
Assistant Attorney General,
JOHN V. LINDSAY,
Executive Assistant to the Attorney General,
GRAY THORON,
Assistant to the Solicitor General,
BEATRICE ROSENBERG,
J. F. BISHOP,
Attorneys,
Department of Justice, Washington 25, D. C.

L. PAUL WINNINGS,
General Counsel,
Immigration and Naturalization Service,
Washington 25, D. C.

INDEX

383755—56—1

CITATIONS

Cases:

Miscellaneous—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 503

CECIL REGINALD JAY, PETITIONER

v.

JOHN P. BOYD, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals (R. 25–26) and the *per curiam* opinion on petition for rehearing (R. 27–28) are respectively reported at 222 F. 2d 820 and 224 F. 2d 957. The District Court's findings of fact and conclusions of law (R. 15–18) have not been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 10, 1955 (R. 26), and a petition for rehearing was denied on August 4, 1955 (R. 27–28). The petition for a writ of certiorari was

filed on November 2, 1955, and was granted on January 9, 1956 (R. 28). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a regulation is valid under the Immigration and Nationality Act of 1952 in providing, with respect to an application for the discretionary relief of suspension of deportation, that the determination may be predicated upon undisclosed confidential information if the disclosure of the information, in the opinion of the hearing officer or the Board of Immigration Appeals, "would be prejudicial to the public interest, safety, or security".

2. Whether compliance with the applicable regulations was sufficiently evidenced in the instant case.

STATUTE AND REGULATIONS INVOLVED

1. The statutory provisions governing petitioner's application for suspension of deportation are Sections 244 (a) (5) and 244 (c) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 214–216, 8 U. S. C. 1254 (a) (5) and 1254 (c). In pertinent part, they are set forth in Appendix A, *infra*, at pp. 56–57. Both sections provide that "the Attorney General *may, in his discretion,* suspend deportation"[1] under certain

[1] Emphasis added. The punctuation is that in Section 244 (a) (5).

specified circumstances. The provisions of Section 244 (d) of the Act, 66 Stat. at 216, 8 U. S. C. 1254 (d), are set forth in Appendix A, *infra,* at p. 58.

2. The regulation, the validity of which petitioner has challenged, is 8 C. F. R. (1952 ed.) 244.3, promulgated December 17, 1952, 17 F. R. 11517. It provides:

> § 244.3 *Use of confidential information.* In the case of an alien qualified for voluntary departure or suspension of deportation under section 242 or 244 of the Immigration and Nationality Act the determination as to whether the application for voluntary departure or suspension of deportation shall be granted or denied (whether such determination is made initially or on appeal) may be predicated upon confidential information without the disclosure thereof to the applicant, if in the opinion of the officer or the Board making the determination the disclosure of such information would be prejudicial to the public interest, safety, or security.

Other relevant regulations are 8 C. F. R. (1952 ed.) 242.53 (c), 242.54 (d) and 242.61 (a), also promulgated December 17, 1952, 17 F. R. 11514, 11515. The pertinent provisions of these regulations are set forth in Appendix B, *infra,* at pp. 59–61.

STATEMENT

The instant habeas corpus proceeding was brought by petitioner in the United States District Court for the Western District of Washington to challenge the validity of the denial of his application for discretionary suspension of deportation under Sections 244 (a) (5) and 244 (c) of the Immigration and Nationality Act of 1952 (R. 3–9). Petitioner's deportation had been ordered under the Act of October 16, 1918, as amended, 64 Stat. 987, 1006, 8 U. S. C. (1946 ed., Supp. V) 137, as an alien who, by his own admission, had been a voluntary member of the Communist Party between 1935 and 1940 (R. 47). The order of deportation had been appealed to, and sustained by, the Board of Immigration Appeals, and its validity is no longer challenged.[2]

The special inquiry officer of the Immigration and Naturalization Service, in the proceedings for the discretionary relief of suspension of deportation (at which petitioner was duly attended by counsel (R. 29)), found that on the record petitioner met the minimum statutory prerequisites for the relief,[3] but stated (R. 48):

---

[2] The return to the writ of habeas corpus stated (R. 12) that a prior application for a writ of habeas corpus was made prior to the application for suspension of deportation, and that its denial by the District Court was not appealed.

[3] *I. e.*, lapse of 10 years since the abandonment of the communist status constituting the ground for deportation; physical presence in the United States for not less than 10 years; absence of a criminal record; moral character; and hardship in the event of deportation (R. 47–48).

> * * * However, after considering confidential information relating to the respondent, as is provided for under 8 CFR 244.3, it is concluded that the respondent's case does not warrant favorable action and that his application for suspension of deportation be denied.

Upon appeal to the Board of Immigration Appeals with respect to the denial of discretionary relief, the Board held (R. 50–51):

> Suspension of deportation is not a matter of right on the part of the alien, but an act of grace on the part of the Attorney General and even without the authority of regulations, resort might be had to confidential information as a basis for denial of discretionary authority. [Citing *United States ex rel. Matranga v. Mackey*, 210 F. 2d 160 (C. A. 2), certiorari denied, 347 U. S. 967.]
>
> * * * There is no requirement on the part of the special inquiry officer that he specifically find that in his opinion the disclosure of the confidential information would be prejudicial to the public interest, safety, or security, as long as he finds that in point of fact such is the situation.
>
> Upon a full consideration of the evidence of record and in light of the confidential information available, it is concluded that the alien is not entitled to discretionary relief.

In his petition for habeas corpus,[4] petitioner alleged, upon "information and belief", that the confidential information consisted of a list circulated among employees in the Immigration Service naming petitioner as among the persons for whom support had been solicited by an organization that the Attorney General had listed as subversive (R. 7), and that because of this list his case for discretionary relief was prejudged (R. 7-8). He also contended that the list was not information the disclosure of which would be prejudicial to the public interest, safety or security, and that the special inquiry officer was not of the opinion that there would be prejudice in such disclosure "nor did he so find or state" (R. 8). He further complained generally against having the decision based upon information outside the record (R. 8).

The government, in its return in the habeas corpus proceeding, denied that the confidential information was of the character or substance asserted by petitioner, and denied prejudgment of petitioner's case (R. 14). The District Court heard testimony and found, *inter alia* (R. 15, 17):

> That the special inquiry officer and the Board of Immigration Appeals, acting for

[4] In the petition, petitioner contended that the basic deportation proceedings were "null and void" because petitioner at "no time violated any condition imposed at the time of his entry" (R. 5). The court below rejected this contention, upon authority of *Galvan* v. *Press*, 347 U. S. 522 (R. 25), and that argument is not presented in the petition for certiorari.

> the Attorney General, exercised their independent judgment in denying discretionary relief. * * *

The Court concluded (R. 17–18):

> The Attorney General, under the provisions of Section 244 (a) (5) of the Immigration and Nationality Act of 1952 (8 USCA 1254 (a) (5)), or his authorized agent, may, * * * to determine eligibility for suspension of deportation, in the absence of a statutory direction or regulations to the contrary, consider confidential information outside the record in formulating his discretionary decision.
>
> * * * [T]he purpose of the regulation is to indicate that confidential information which would be prejudicial to the public interest, safety, or security need not be disclosed. A special finding that such information would be prejudicial to the public interest, safety, or security is not required by the regulation.

The Court of Appeals affirmed *per curiam*, holding that the special inquiry officer had "recit[ed] that the denial was on the basis of confidential information relating to the appellant, disclosure of which, in the opinion of the officer, would be prejudicial to the public interest. This ruling of the officer was expressly authorized by C. F. R. Title 8, § 244.3."

Upon petition for rehearing, challenging the court's paraphrasing of the officer's recital, the

Court of Appeals quoted the officer's language, and stated (R. 28):

> * * *. We think that this is a statement to the effect that the hearing officer was considering the confidential information under the circumstances, upon the conditions, and in the manner provided by the regulation. He considered it "as is provided for" under the regulation.
>
> * * * Here it is apparent that the officer complied with the regulation as a matter of substance. We agree with the trial court that the regulations require no special finding in any particular words or language. * * *

The court further rejected petitioner's general objection to reliance upon confidential information, and cited *United States ex rel. Matranga* v. *Mackey*, 210 F. 2d 160 (C. A. 2), certiorari denied, 347 U. S. 967.

SUMMARY OF ARGUMENT

I

The basic issue in this case is whether, under the Immigration and Nationality Act of 1952, the discretionary relief of suspension of deportation may be validly denied on the basis of confidential information where disclosure "would be prejudicial to the public interest, safety, or security". It is the government's position that, in view of the nature of the relief, the congressional purposes manifested in the statute, and the legisla-

tive history of the provisions relating to suspension, the regulation which permits the discretionary decision to be based upon such undisclosed confidential information is valid.

A. Sections 244 (a) (5) and 244 (c) of the Immigration and Nationality Act of 1952 (App. A, *infra*, pp. 56–57) vest in the Attorney General a broad discretionary power, as a matter of grace or clemency, to suspend the deportation of aliens who meet certain minimum requirements of eligibility. The statute contains no language requiring the Attorney General to hold hearings or to make findings in suspension cases, stating only that the Attorney General "may" act, "in his discretion". This power is as broad, and may be exercised in the same manner, as a judge's in suspending sentence or a chief executive's in commuting a sentence or pardoning an offense.

These broad statutory purposes have been recognized and confirmed by applicable decisions of this Court and of the courts of appeals.

B. When Congress vested in the Attorney General discretion to suspend deportation as an act of grace or clemency, and not as a matter of right, it manifested a purpose that the power should be exercised in as broad a fashion as the closely analogous discretionary powers relating to judicial sentencing and executive clemency. Since such powers are frequently exercised, in the sole discretion of the dispensing authority, on the

basis of non-record confidential information, there is an unusually strong implication that Congress has similarly authorized the Attorney General to act on the basis of such information.

Frequently, the exercise of the suspension power involves matters of international policy and security which might be seriously prejudiced if a full hearing were required in every case. Thus Congress had very strong reasons for not requiring a hearing or limiting the information on which this discretion was to be exercised. It would do clear violence to the plain congressional purpose to read Section 244 of the 1952 Act (App. A., *infra*, pp. 56–58) as an affirmative mandate that clemency must be granted in every case unless the government feels free to make public the confidential information or reasons which motivate a refusal to grant the requested relief.

Substantial judicial authority upholds the foregoing conclusions, even though the prior legislation was less emphatic in its bestowal of discretionary power than the instant provision and the regulations less explicit in permitting use of confidential information. *United States ex rel. Matranga* v. *Mackey*, 210 F. 2d 160 (C. A. 2), certiorari denied, 347 U. S. 967. This Court has held that, where the sentencing or pardoning power is involved, non-record information may

be used (*Williams* v. *New York*, 337 U. S. 241), that where the relief sought is not of right, security considerations may justify the absence of disclosure (*Shaughnessy* v. *Mezei*, 345 U. S. 206), and that political judgments may be based on confidential executive information (*Chicago & Southern Air Lines* v. *Waterman Corp.*, 333 U. S. 103).

C. The legislative history also confirms the congressional purpose and understanding that what is here involved is an exceptional extending of clemency, analogous to executive pardon. In discussing the first suspension statute in 1940, which used only the word "may", the legislators employed the words "clemency", "leniency", and "amnesty". In the later 1952 enactment the emphatic words "in his discretion" were added. Possible use of confidential information was contemplated under both statutes.

D. Regulation 8 C. F. R. (1952 ed.) 244.3 (*supra*, p. 3) does not authorize the use of confidential information in making determinations as to the applicant's statutory eligibility for relief. It permits the use of such information only in determining whether discretion should be exercised, and even then only when disclosure "would be prejudicial to the public interest, safety, or security". These limitations lend further support

to the reasonableness and validity of this regulation, which fully accords with the policy and purposes disclosed by the statute on its face and by its legislative history.

II

Petitioner alternatively urges that the regulations call for a partial disclosure of such confidential information, either through a "fair résumé" or through a "discuss[ion of] the nature of the derogatory accusations and [a] recit[ation of] how and why such information has affected [the hearing officer's] judgment". This additional contention is directly refuted by the wording and context of the applicable regulations, the controlling language of which is that the exercise of discretion "may be predicated upon confidential information *without the disclosure thereof to the applicant*" (emphasis added). 8 C. F. R. (1952 ed.) 244.3 (*supra*, p. 3).

The regulations governing the determination of petitioner's application for suspension of deportation were all promulgated at the same time and must be read in context. They draw an important distinction between determinations of matters of statutory eligibility and determinations of clemency once eligibility is established. That the Attorney General has in the regulations

prescribed a hearing for certain aspects of suspension proceedings does not give rise to any inconsistency, since the same regulations make specific provision for the limited use of confidential information. These regulations nowhere provide on their face for the partial disclosure of the confidential information. The requirement for such partial disclosure, which petitioner seeks to read into them by implication, is directly rebutted by the unambiguous language of Section 244.3. The record in the instant case shows that the hearing officer and the Board of Immigration Appeals properly complied with all applicable regulations.

ARGUMENT

In the case at bar, petitioner does not challenge or question the validity or fairness of the proceedings in which he was found deportable as an alien who by his own admission had been a voluntary member of the Communist Party between 1935 and 1940. He now challenges only the subsequent refusal to grant his application for suspension of deportation made pursuant to Sections 244 (a) (5) and 244 (c) of the Immigration and Nationality Act of 1952 (App. A, *infra*, pp. 56–57). Under these sections the Attorney General "may, in his discretion,"[5] as a matter of

[5] Punctuation is that in Section 244 (a) (5).

grace or clemency, suspend deportation of an alien meeting certain statutory requirements. While petitioner was found to meet the minimum requisites for statutory eligibility (R. 48) he was denied this discretionary relief on the basis of confidential information which had been considered pursuant to Regulation 8 C. F. R. (1952 ed.) 244.3 (*supra*, p. 3) (R. 48, 51).[6]

The main thrust of petitioner's attack is directed at the alleged invalidity of the regulation under which the confidential information was used (Pet. Br. 8–22; see Am. Cur. Br. 6–21).[7] In substance, he argues that, since Congress has not affirmatively specified the procedure to be followed in considering suspension applications, the scope of the Attorney General's discretion should be narrowly limited (Pet. Br. 8–22; see Am. Cur. Br. 14–21), so that such applications must be granted in every case in which the government decides it is not free to make public the reason for an adverse decision. Petitioner's attack on the validity of the regulation is unsound and

[6] This regulation provides that "the determination as to whether the application for * * * suspension of deportation shall be granted or denied * * * may be predicated upon confidential information without the disclosure thereof to the applicant, if in the opinion of the officer or the Board making the determination the disclosure of such information would be prejudicial to the public interest, safety, or security".

[7] References to petitioner's brief are indicated by "Pet. Br.". References to the *amicus curiae* brief of the American Jewish Congress are indicated by "Am. Cur. Br.".

without merit, since, as shown in Point I (*infra*, pp. 13–50), it runs squarely counter to the language and manifested purposes of Section 244 and its legislative history.

Alternatively, petitioner argues that, even if this regulation is valid, there was a failure to comply with certain implied requirements which he reads into the regulations, claiming that they call for either a "fair résumé" of the confidential information, or a discussion of its nature and the manner in which it affected the hearing officer's decision (Pet. Br. 7, incorporating Am. Cur. Br. 21–29). This alternative is likewise unsound, since, as shown in Point II (*infra*, pp. 50–55), the regulations on their face rebut petitioner's contentions, and were in all respects properly complied with.

I. THE DISCRETIONARY RELIEF OF SUSPENSION OF DEPORTATION IS A MATTER OF GRACE AND CLEMENCY, AND MAY BE VALIDLY DENIED ON THE BASIS OF CONFIDENTIAL INFORMATION

A. THE STATUTE MAKES SUSPENSION OF DEPORTATION AN ACT OF CLEMENCY, WHICH MAY BE GRANTED OR DENIED IN THE DISCRETION OF THE ATTORNEY GENERAL

1. Sections 244 (a) (5) and 244 (c) of the Immigration and Nationality Act of 1942 (App. A, *infra*, pp. 56–57) provide that the Attorney General "may, in his discretion," temporarily suspend the deportation of a deportable alien meeting certain specified minimum requirements of

moral character, hardship, and residence within the United States. If deportation is suspended, the Attorney General must then report the case in detail to Congress. If Congress, within a specified time, affirmatively approves the Attorney General's action by a concurrent resolution, the deportation is cancelled.[8] If Congress fails to act, the Attorney General is required to deport.

Nowhere in the legislation is there language "requir[ing] the Attorney General to hold hearings or make findings in suspension cases".[9] Nor is there any language restricting the basis of the information upon which, or the procedure by which, the discretion is to be exercised. The statute provides only that the Attorney General "may" act, "in his discretion". Not content with the implications of discretion arising from the mere use of the word "may" (see *infra*, p. 18, fn. 14), Congress made its purpose unmistakably clear in both subdivisions (a) and (c) of Section 244 by

[8] A similar procedure applies to cases arising under Sections 244 (a) (4) and 244 (c). Under Sections 244 (a) (1), (2) or (3) and 244 (b), relating to other classes of aliens, the administrative action suspending deportation becomes final when Congress does not take affirmative action to the contrary. However, the statute makes no provision for congressional review in any case in which suspension is denied. Of course, Congress is not thereby precluded from enacting a special act for the alien's benefit, even though it was obviously hoped that the statutory procedure would substantially reduce the direct requests for such legislation.

[9] See *Shaughnessy* v. *Accardi*, 349 U. S. 280, 285 (dissenting opinion of Mr. Justice Black).

coupling "may" with the explanatory words "in his discretion".

This broad language is in sharp contrast with Section 242 (b), dealing with the procedure for making the basic determination of deportability. This latter section bristles at every point with the mandatory word "shall", and specifically commands that the determination of the basic question be made "only upon a record made in a proceeding before a special inquiry officer", and "upon reasonable, substantial, and probative evidence".[10]

---

[10] Sec. 242 (b), 8 U. S. C. 1252 (b) provides, in pertinent part (emphasis added):

> A special inquiry officer *shall* conduct proceedings under this section to determine the deportability of any alien, and *shall* administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, *shall* make determinations, including orders of deportation. Determination of deportability in any case *shall* be made only upon a record made in a proceeding before a special inquiry officer, at which the alien *shall* have reasonable opportunity to be present, unless by reason of the alien's mental incompetency it is impracticable for him to be present, in which case the Attorney General *shall* prescribe necessary and proper safeguards for the rights and privileges of such alien. * * * No special inquiry officer *shall* conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section *shall* be in accordance with such regulations, not inconsistent with this Act, as the Attor-

This contrast is well within the reminder of Mr. Justice Cardozo that, in construing a statute, reference should be made to "the aid to be derived from the wording of related sections".[11] Congress was plainly discriminating in this legislation between a determination of deportability on the basis of a record, and a recommendation of clemency following a finding of deportability. It is

---

ney General *shall* prescribe. Such regulations *shall* include requirements that—

(1) the alien *shall* be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

(2) the alien *shall* have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien *shall* have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability *shall* be valid unless it is based upon reasonable, substantial, and probative evidence.

The procedure so prescribed *shall* be the sole and exclusive procedure for determining the deportability of an alien under this section. * * *

[11] *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315. See also (at p. 316) in the same decision: "There are times when the obscurity of one section as contrasted with the clearness of another may be ascribed to inattention. The need is not perceived of filling up the outlines because what is within them is assumed or carelessly overlooked. Not so in this case where Congress had its attention sharply directed to the fact that plain speech was needed if a hearing was to mean so much."

the same type of contrast found between the fixed, precise procedure required in determinations of criminal guilt, and the complete procedural leeway allowed in determining sentence after conviction, or executive clemency after sentence (*infra*, pp. 27–28).

An application for suspension of deportation does not call for a determination of a right to which the applicant is automatically entitled once certain facts are established. Rather, after the alien has been accorded a full hearing on the issue of deportability, he is given a further opportunity to request that a discretionary exception shall be made in his particular case. Under the statute, this is a matter of grace or clemency in the nature of a pardon.[12] In the determination of deportability, the statute specifically provides for a decision based on evidence openly adduced at a formal hearing. However, for the exercise of discretion in suspending deportation, just as in suspending or commuting a sentence, or granting a pardon, the statute leaves the widest leeway to the administrator.[13]

[12] As stated by Judge Learned Hand in *United States ex rel. Kaloudis v. Shaughnessy*, 180 F. 2d 489, 491 (C. A. 2): "The power of the Attorney General to suspend deportation is a dispensing power, like a judge's power to suspend the execution of a sentence, or the President's to pardon a convict."

[13] It should be noted that, in the realm of legislation outside the Immigration and Nationality Act, Section 10 of the Administrative Procedure Act, 60 Stat. 237, 243, 5 U. S. C. 1009, enacted in solicitude for procedural rights, neverthe-

2. The unusually broad scope of the discretionary power which Congress has conferred upon the Attorney General in connection with granting or denying suspension of deportation has been recognized by this Court and by a number of lower federal courts in a series of decisions construing the predecessor suspension statute.[14] These decisions (*infra*, pp. 18–23) uniformly recognize that a refusal to grant suspension of deportation to an alien who establishes his statutory eligibility is not subject to judicial review except for failure to exercise any discretion or for abuse of discretion apparent from the grounds expressed in the administrative ruling itself.

In *Accardi* v. *Shaughnessy*, 347 U. S. 260, arising under the predecessor statute, although this Court held that Accardi was entitled to offer proof of pre-judgment (i. e. failure to exercise

---

less makes a substantial exception in its application when "agency action is by law committed to agency discretion."

[14] Congress first provided for suspension of deportation in 1940 by adding a new provision, Section 19 (c), to the Immigration Act of 1917, 39 Stat. 874, as added, 54 Stat. 672, and amended, 62 Stat. 1206, 8 U. S. C. (1946 ed. Supp. V) 155 (c). Section 19 (c) provided that "the Attorney General may . . . suspend deportation", while the 1952 Act adds to the word "may" the further words "in his discretion" (see *supra*, pp. 14–15). Also, the regulations applicable to the instant case make specific the provision that the exercise of discretion "may be predicated upon confidential information", whereas the prior regulations did not.

any discretion)[15] the opinion contains this significant *caveat* (347 U. S. at 268, italics in original):

> It is important to emphasize that we are not here reviewing and reversing the *manner* in which discretion was exercised. If such were the case we would be discussing the evidence in the record supporting or undermining the alien's claim to discretionary relief. Rather, we object to the Board's alleged *failure to exercise* its own discretion, contrary to existing valid regulations.

As regards the non-reviewability of the *manner* of exercising discretion, there was clear agreement and, indeed, further emphasis by Mr. Justice Jackson (with whom Mr. Justice Reed, Mr. Justice Burton, and Mr. Justice Minton joined) dissenting on the ground that habeas corpus would not lie (347 U. S. at 269):

> Congress vested in the Attorney General, and in him alone, discretion as to whether to suspend deportation under certain circumstances. We think a refusal to exercise that discretion is not reviewable on habeas corpus, first, because the nature of the power and discretion vested in the Attorney General is analogous to the power of pardon or commutation of a sentence * * *.

The lower courts have also noted the discretionary nature of the relief and concluded that the courts cannot review the discretion of the

[15] Such pre[illegible]dgment was ultimately found not to have been established. *Shaughnessy* v. *Accardi*, 349 U. S. 280.

Attorney General as regards the types of evidence which he chooses to rely upon. A repeatedly cited decision to this effect was written in 1950 by Judge Learned Hand in *United States ex rel. Kaloudis* v. *Shaughnessy*, 180 F. 2d 489 (C. A. 2); with respect to the earlier counterpart of the instant legislation. Speaking for a unanimous panel, Judge Hand stated (180 F. 2d at 490–491):

> * * * True, without an inquiry we cannot know whether membership in the "[International Workers] Order" is prejudicial; for we cannot tell whether the Attorney General had adequate grounds for "proscribing" it. On the other hand we cannot say that he did not; and, *if* the relator has the privilege of inquiring into the grounds, he has been wronged, and the writ should have gone. *An alien has no such privilege; unless the ground stated is on its face insufficient, he must accept the decision, for it was made in the "exercise of discretion," which we have again and again declared that we will not review.* [Citing cases.]
>
> Nor has the relator any constitutional right to demand that we should. As we have said, any "legally protected interest" he ever had has been forfeited by "due process of law"; forfeited as completely as a conviction of crime forfeits the liberty of the accused, be he citizen or alien. *The power of the Attorney General to suspend deportation is a dispensing power,*

> *like a judge's power to suspend the execution of a sentence, or the President's to pardon a convict. It is a matter of grace* over which courts have no review, unless * * * it *affirmatively* appears that the denial has been actuated by considerations that Congress could not have intended to make relevant. * * * [Emphasis added.]

In *United States ex rel. Adel* v. *Shaughnessy*, 183 F. 2d 371 (C. A. 2), the complaint was as to the type of evidence relied upon, not that it was confidential but that it consisted of a finding by an immigration inspector in an earlier hearing. The alien claimed the right to test the finding in a hearing. The court held (183 F. 2d 371, 372):

> The courts cannot review the exercise of such discretion; they can interfere only when there has been a clear abuse of discretion or a clear failure to exercise discretion.

Moreover, the court held that the statutory condition of five years of good moral character preliminary to application for suspension did not preclude reliance by the Board of Immigration Appeals upon the alien's earlier bad character (183 F. 2d at 372–373), thus indicating that the statutory conditions of character, residence, and hardship were not the only proper criteria for the exercise of the broad unrestricted discretion conferred by the statute.[16]

[16] See also *United States ex rel. Weddeke* v. *Watkins*, 166 F. 2d 369, 373 (C. A. 2), certiorari denied, 333 U. S. 876, in which suspension of deporation was denied upon the

The Court of Appeals for the District of Columbia Circuit, in *Caddeo* v. *McGranery*, 202 F. 2d 807, under Section 19 (c) of the earlier Immigration Act (see fn. 14, *supra*, p. 18) sustained a denial of suspension of deportation in the face of allegations that the alien possessed the statutory residence requirements, and good moral character, concluding that only actual failure to exercise discretion or manifest abuse of discretion would afford a basis for judicial intervention. In the same circuit, the Court of Appeals in three decisions handed down on February 2, 1956, emphatically upheld the broad discretionary aspects of the power under the prior

basis of a state court conviction of incest (although alleged to have been unconstitutionally arrived at, and not *res judicata* in the deportation proceedings): *United States ex rel. Walther* v. *District Director of Immigration and Naturalization*, 175 F. 2d 693 (C. A. 2), in which the court (L. Hand, Clark, and Frank, JJ.) considered that the word "may" in the then statute (8 U. S. C. (1946 ed.) 155 (c)) "confers discretionary unreviewable power" (p. 694), although in that case the alien's only offense was illegal entry some ten years before, and he had a wife and two children, all born in the United States and dependent entirely on him for support, and had served in the United States Navy in World War II: *Sheddens* v. *Shaughnessy*, 177 F. 2d 363, 364 (C. A. 2), in which suspension of deportation was denied one who entered without visa, despite a citizen child born half a year after entry; cf. *United States ex rel. Ickowicz* v. *Day*, 18 F. 2d 962 (C. A. 2), in which a rehearing was denied of a request to be permitted to remain in the United States, although the district judge and the United States attorney had recommended granting the application to remain as being deserving.

and the present statute. *Asikese* v. *Brownell*, 230 F. 2d 34; *Melachrinos* v. *Brownell*, 230 F. 2d 42; and *Vichos* v. *Brownell*, 230 F. 2d 45.[17]

The policy of the statute and the decisions of this Court and of the courts of appeals afford compelling confirmation of what is apparent in the statute and regulations themselves—namely that what is here involved is a broad administrative discretion, relating to an act of clemency in the nature of a conditional pardon.

B. THE STATUTE MANIFESTS A PURPOSE TO GIVE THE ATTORNEY GENERAL DISCRETION TO USE CONFIDENTIAL INFORMATION IN DECIDING APPLICATIONS FOR SUSPENSION

1. When Congress, in Sections 244 (a) (5) and 244 (c),[18] vested in the Attorney General an unfettered discretion to grant or deny suspension of deportation as an act of grace or clemency, and not as a matter of right (*supra*, pp. 13–23), it strongly manifested a purpose that the power should be exercised in a similar fashion to the closely analogous discretionary powers relating

[17] In the Third Circuit, the government's view of the strong general effect of the word "discretion" is supported in the analogous decision of *Arakas* v. *Zimmerman*, 200 F. 2d 322, in which an alien sought to attack the refusal of the Board of Immigration Appeals to reopen a deportation proceeding for consideration of suspension of deportation. The Court of Appeals held that no hearing was required upon such a motion, it appearing that the Board had exercised its discretion in accord with the regulation.

[18] Sections 244 (a) (1) (2) (3) and (4) and 244 (b) in this respect disclose a similar policy.

to judicial sentencing and executive clemency. Since these powers may properly be, and frequently are, exercised in the sole discretion of the dispensing authority, on the basis of non-record confidential information, there is an unusually strong implication that Congress was similarly authorizing the Attorney General to be free to utilize such information. This implication becomes even stronger in view of the elements of international policy and security which might be seriously prejudiced if suspension were to be made a matter of right or if a full hearing were to be required irrespective of the circumstances of the particular case.

For example, subsection (d) of Section 244 (App. A, *infra*, p. 58) requires that, upon the cancellation of deportation of an alien, any quota to which the alien is chargeable must be reduced. The Senate Committee report accompanying the 1952 Act (S. Rep. No. 1137, 82d Cong., 2d Sess., p. 25) recognized that law abiding aliens who await their turn abroad, on the quota waiting list, normally have a very strong prior claim to become permanent residents of this country over aliens, who illegally have gained admission or overstayed a lawful entry without compliance with the established quota procedure. The Act "accordingly establishes a policy that the administrative remedy [of suspension of deportation] should be available only in the very limited category of cases in which the deportation of the

alien would be unconscionable" (*ibid.*). Thus, the administrative recommendation to Congress may necessitate a balancing of the benefit for the specific alien as against its adverse effect on quotas, thereby necessarily taking into account considerations of international relations which cannot at all times be made a matter of record.

Wholly apart from its possible effect on quotas and international relations, Congress obviously recognized that decisions regarding suspension might also involve substantial security considerations. For instance, an alien who has been found deportable and who applies for suspension may be known through confidential sources to be actively engaged in subversion or, more directly, to be an espionage agent for a foreign country. The mere revelation that the government has such knowledge may in itself be damaging, at the very least, in informing the subversive organization or foreign nation that there is a leak in its own secrecy pattern, and probably also in revealing indirectly or by processes of elimination the source of the information. An alien, seeking discretionary relief from conduct which has been found to subject him to deportation, should not be able, by his act in applying for executive and congressional clemency, to impose upon the government the alternative of disclosing such sources of information, or allowing the deportable alien to remain permanently in the United States.

In short, both the language and the purpose of Section 244 of the Act indicate that Congress had strong reasons for not requiring a hearing or limiting the information on which this discretion was to be exercised. It would do clear violence to the manifested congressional purpose to read that section as an affirmative mandate that the clemency *must* be granted in every case, unless the government feels free to make public the reasons for not granting the requested relief. Thus it follows, from the nature of the power and of the discretion conferred by the statute, that the Attorney General may properly use confidential information in its exercise.

2. The Second Circuit expressly so held in *United States ex rel. Matranga* v. *Mackey*, 210 F. 2d 160, certiorari denied, 347 U. S. 967, even when the regulations did not provide specifically for the use of confidential information. Relying *inter alia* upon the *Kaloudis* and *Adel* decisions (discussed *supra*, pp. 20–21), the court held (210 F. 2d at 161):

> We do not understand appellant to base his contention on the use of confidential information in the administrative determination of his deportability or of his eligibility for suspension of deportation. In any event, the record does not show the use of confidential information in the determination of these issues. Since it was used only for its bearing on the formula-

> tion of a discretionary decision, our precedents bar relief. [Citing decisions.] * * * The Attorney General, in making a discretionary determination, may consider confidential information; there is nothing to the contrary in the Regulations.

In this holding, the Court of Appeals was following principles enunciated by this Court in similar situations involving discretionary judgments.

Thus, Mr. Justice Black, speaking for this Court in *Williams* v. *New York*, 337 U. S. 241, in a murder case in which the jury recommended life imprisonment but the trial judge, in his discretion, increased the penalty to death "after considering information as to [defendant's] previous criminal record without permitting him to confront or cross-examine the witnesses" (337 U. S. at 241), stated (at 247, 251):

> A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an

opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.

* * * * *

Leaving a sentencing judge free to avail himself of out-of-court information in making such a fateful choice of sentences does secure to him a broad discretionary power, one susceptible of abuse. But in considering whether a rigid constitutional barrier should be created, it must be remembered that there is possibility of abuse wherever a judge must choose between life imprisonment and death. And it is conceded that no federal constitutional objection would have been possible if the judge here had sentenced appellant to death because appellant's trial manner impressed the judge that appellant was a bad risk for society, or if the judge had sentenced him to death giving no reason at all. We cannot say that the due process clause renders a sentence void merely because a judge gets additional out-of-court information to assist him in the exercise of this awesome power of imposing the death sentence.

Serious as deportation is, the judgment as to whether to suspend deportation is not more serious than the choice between life and death. In the exercise of the power to suspend deportation, the officials in whom discretion is vested should be as free as a judge in imposing sentence to consider matters which it is contrary to some established policy to reveal.

A comparable indication of the basic congressional approach appears in Section 241 (b) of the Act. This section provides that a crime for which the alien is pardoned, or as to which a judge so recommends, is not to be ground for deportation.[19] In granting or denying a pardon effective to prevent deportation, the President or a governor would not be precluded, by provisions of this section, from using or acting on the basis of undisclosed confidential information. Similarly, the sentencing judge in making or refusing to make a conclusive recommendation against deportation is left wholly free to utilize such confidential information, irrespective of the express provision allowing representations against the granting of such relief to be made by the prosecuting authorities. Accordingly, Congress has indicated that it had no basic objection to fully discretionary action within the area of clemency.

[19] Section 241 (b), 66 Stat. 208, 8 U. S. C. 1251 (b), provides: "The provisions of subsection (a) (4) respecting the deportation of an alien convicted of a crime or crimes shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States, or (2) if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Service, and prosecution authorities, who shall be granted an opportunity to make representations in the matter."

This Court has recognized that considerations of security may themselves justify the use of confidential information under circumstances substantially more doubtful than in the instant case. In *Knauff* v. *Shaughnessy*, 338 U. S. 537, and *Shaughnessy* v. *Mezei*, 345 U. S. 206, aliens, who had met every congressionally established qualification for admission to this country, were nevertheless held to have been properly excluded following an administrative determination, based on undisclosed confidential information, that their entry would be "prejudicial to the interests of the United States" (338 U. S. at 541; 345 U. S. at 211). Thus *Knauff* and *Mezei* did not involve any act of clemency or special dispensation of the kind here involved, which, as we have already emphasized (*supra*, pp. 27–29), is customarily exercised in the unfettered discretion of the dispensing authority, and frequently on the basis of undisclosed confidential information.

Furthermore, this petitioner's statutory right to be in the United States has long since been terminated by full deportation proceedings in which he has been fully accorded all constitutional due process requirements. Petitioner has no more statutory "right" to be permitted to remain in the United States[20] than either Mezei, who had

[20] The decision in *Kwong Hai Chew* v. *Colding*, 344 U. S. 590, and the discusion therein of the *Knauff* case, *supra*, does not affect the pertinence of the *Mezei* case. In *Kwong Hai Chew*, upon return of a resident alien from service as a

spent a long period of years in the United States (345 U. S. at 208), or Ellen Knauff, who was the wife of a United States citizen (338 U. S. at 549, 550–551), had any statutory "right" to enter. All had to be dealt with under statutes which granted to the executive certain broad powers, but which did not spell out the manner in which these powers were to be exercised. In each case, the authority to act upon confidential informatiton was only affirmatively spelled out, as here, in the implementing regulations (see 345 U. S. at 211–213, fn. 7 and 8). In view of the clemency nature of the power here involved; the instant regulation (*supra*, p. 3) is more clearly within the statutory purview than the earlier one, the validity of which was sustained in *Knauff* and *Mezei*.

As this Court held, in the *Mezei* case (345 U. S. at 210–211):

> Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control. [Citing decisions.] In the exercise of these powers, Congress expressly authorized the

---

seaman on a vessel of United States registry, it was sought to exclude him without notice or hearing. His right to be in the United States had never before been challenged, and had, indeed, been established by special act of Congress, and he had not, as in the instant case, had full procedural process and had not yet been properly found without right to be within the United States (344 U. S. at 592–593).

> President to impose additional restrictions on aliens entering or leaving the United States during periods of international tension and strife. That authorization, originally enacted in the Passport Act of 1918, continues in effect during the present emergency. Under it, the Attorney General, acting for the President, may shut out aliens whose "entry would be prejudicial to the interests of the United States." And he may exclude without a hearing when the exclusion is based on confidential information the disclosure of which may be prejudicial to the public interest. * * *

Moreover, as already noted (*supra*, pp. 24–25), the judgment as to whether to suspend deportation as to one alien may affect more than the individual alien since, as the Court of Appeals for the District of Columbia Circuit, in its decision of February 2, 1956, in *Melachrinos* v. *Brownell*, 230 F. 2d 42, 45, points out:

> It is important to bear in mind that when the Attorney General does exercise his discretion in favor of an alien who is here illegally this reduces by such admission the immigration quota of that alien's nationality and might very well result in exclusion of an alien who wished to come here legally, with the intention of making this his permanent home and establishing here close family ties and of fixing permanent roots in the United States.

This over-all political effect of allowance of aliens to remain in the United States by suspension of deportation brings into sharp focus the language of Mr. Justice Cardozo, speaking for this Court in *Norwegian Nitrogen Co.*, 288 U. S. at 319, with respect to an investigation by the Tariff Commission:

> * * * [W]ithin the meaning of this act the "hearing" assured to one affected by a change of [import] duty does not include a privilege to ransack the records of the Commission, and to subject its confidential agents to an examination as to all that they have learned. * * *.

In *Chicago & Southern Air Lines* v. *Waterman Corp.*, 333 U. S. 103, this Court denied court review in the case of orders of the Civil Aeronautics Board that were subject to presidential approval, the Court employing language equally appropriate to the instant exercise of discretion (333 U. S. at 111):

> The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if

> courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry. [Citing decisions.] * * *

Also pertinent in this connection are decisions dealing with the discretionary determination that an alien may not be subjected to physical persecution in the country to which deported.[21] In *United States ex rel. Dolenz* v. *Shaughnessy*, 206 F. 2d 392, 394–395 (C. A. 2),[22] the court said:

> * * * [W]e see nothing in the statute to suggest that the courts may insist that the Attorney General's opinion be based solely

[21] The discretionary action was tested under Section 243 (h) of the 1952 Act, 66 Stat. 214, 8 U. S. C. 1253 (h), which provides: "The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason."

[22] See also 200 F. 2d 288, certiorari denied, 345 U. S. 928.

> on evidence which is disclosed to the alien. In his official capacity the Attorney General has access to confidential information derived from the State Department or other intelligence services of the Government which may be of great assistance to him in making his decision as to the likelihood of physical persecution of the alien in the country to which he is to be deported. We believe Congress intended the Attorney General to use whatever information he has. To preclude his use of confidential information unless he is willing to disclose it to the alien would defeat this purpose. Moreover, the very nature of the decision he must make concerning what the foreign country is likely to do is a political issue into which the courts should not intrude. As was said in Chicago & Southern Air Lines v. Waterman S. S. Corp., 333 U. S. 103, 111, 68 S. Ct. 431, 436, 92 L. Ed. 568: "But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial".

See also *Namkung* v. *Boyd*, 226 F. 2d 385, 388–389 (C. A. 9).

As against the foregoing refusals of the courts to limit the information relied upon when discretionary administrative decisions are involved, the district court cases upon which petitioner relies have little authority. *Alexiou* v. *McGrath*, 101 F. Supp. 421 (D. D. C.), and *Maeztu* v.

Brownell, 132 F. Supp. 751 (D. D. C.), to which may be added *Orahovats* v. *Brownell*, 134 F. Supp. 84 (D. D. C.), and *Ex parte Mota Singh Chohan*, 122 F. Supp. 851 (N. D. Cal.). These decisions arose under the former regulations, which did not contain the present specific authorization (*supra*, p. 3) for use of confidential information, and turned primarily on a finding that the regulations then in effect made mandatory a quasi-judicial procedure for which all evidence must be of record.[23]

With the issuance of the new regulations specifically authorizing the use of confidential information, the only foundation for applying that reasoning to the instant case is swept aside. Furthermore, even upon the basis of the former regulations, these district court decisions are contrary to (a) the holding of the Court of Appeals for the Second Circuit in *United States ex rel. Matranga* v. *Mackey*, 210 F. 2d 160, certiorari denied, 347 U. S. 967 (*supra*, pp. 26–27), and (b) the Attorney General's interpretation of his own regulations. Finally, they are basically inconsistent with the reasoning of the decisions, discussed

[23] It is to be noted that the dissenting view in *Shaughnessy* v. *Accardi*, 349 U. S. 280, 289, in criticizing the use of information not of record before the Board of Immigration Appeals, also did so upon an assumption that a hearing was required under the regulations then in effect, from which hearing requirement, in turn, the requirement of record evidence was derived. Under the present regulations this requirement is expressly negated (*supra*, p. 3).

above at pages 18–23; 26–28, 30–35, relating to the scope of review of discretionary decisions.[23a] The authority to recommend what is in essence a pardon ought not to be changed from a permission to act at discretion into a mandate forcing the recommending of the pardon whenever information derogatory to the alien is within the confidential area necessarily characteristic of much executive international and security source material.

3. The argument advanced by *Amicus Curiae* (Am. Cur. Br. 17–19), based upon a negative implication drawn from Section 235 (c) of the 1952 Act,[24] wholly ignores the controlling distinction between the two sections. Section 235 (c) deals with a factual determination of statutory qualifications involving a matter of right or status accorded by Congress to aliens wishing to enter this country. On the other hand, Section 244, the provision here involved, provides for an exercise of grace or clemency (*supra,* pp. 13–17).

[23a] At the time that these District Court cases arose there was no substantial practical occasion for appeal by the Government since the new regulations were imminent or had become effective (see Government Brief in Opposition in *United States ex rel. Matranga* v. *Mackey*, O. T. 1953, No. 663, p. 9).

[24] Section 235 (c), 66 Stat. 199, 8 U. S. C. 1225 (c), provides: "Any alien (including an alien crewman) who may appear to the examining immigration officer or to the special inquiry officer during the examination before either of such officers to be excludable under paragraph (27), (28), or (29) of section 212 (a) shall be temporarily excluded, and no fur-

For contested fact determinations bearing on matters of right, an adequate hearing and record evidence is the norm in the field of immigration, and can only be departed from in the very few kinds of cases (such as those involving exclusion of aliens) which are not governed by the Constitutional requirements of due process. In the absence of a specific Congressional mandate to the contrary, a purpose to require an adequate hearing for such a determination would be a matter of normal implication. However, since resort to confidential information is customary in connection with the exercise of discretionary powers in the nature of grace or clemency, including suspension cases, the normal implication to be drawn from the wording and purpose of Section 244 is that the dispensing authority may consider such

---

ther inquiry by a special inquiry officer shall be conducted until after the case is reported to the Attorney General together with any such written statement and accompanying information, if any, as the alien or his representative may desire to submit in connection therewith and such an inquiry or further inquiry is directed by the Attorney General. If the Attorney General is satisfied that the alien is excludable under any of such paragraphs on the basis of information of a confidential nature, the disclosure of which the Attorney General, in the exercise of his discretion, and after consultation with the appropriate security agencies of the Government, concludes would be prejudicial to the public interest, safety, or security, he may in his discretion order such alien to be excluded and deported without any inquiry or further inquiry by a special inquiry officer. Nothing in this subsection shall be regarded as requiring an inquiry before a special inquiry officer in the case of an alien crewman."

evidence. If the congressional policy had been otherwise, mandatory words requiring a hearing would have almost certainly been used. This normal implication is further reinforced by the reasoning and authorities already discussed and by the extensive legislative history (*infra*, pp. 39–49).

C. THE LEGISLATIVE HISTORY CONFIRMS THE BROAD SCOPE OF THE STATUTORY LANGUAGE AND PURPOSE

1. The instant statutory provision was modified and reenacted in the Immigration and Nationality Act of 1952 upon a basis of congressional reports and debates which confirm what is implicit in the legislative history, namely, that the provision vests in the Attorney General unusually broad discretionary power, akin to a judge's power to suspend sentence or a chief executive's power to commute or pardon. The only limitations imposed by the 1952 Act show a strong purpose to restrict the granting of suspension to cases of very unusual hardship. Where the alien was deportable, for reasons prescribed by Congress, suspension was to be the exception, not the rule. Congress thus provided stringent minimum requirements for eligibility to prevent any undue erosion of the normal statutory policy for deportation or disruption to an orderly and fair administration of the congressionally established quota system.

Thus, the Senate Committee report accompanying the 1952 Act[25] stated:

> The term "exceptional and extremely unusual hardship" requires some explanation. The committee is aware that in almost all cases of deportation, hardship and frequently unusual hardship is experienced by the alien or the members of his family who may be separated from the alien. The committee is aware, too, of the progressively increasing number of cases in which aliens are deliberately flouting our immigration laws by the processes of gaining admission into the United States illegally or ostensibly as nonimmigrants but with the intention of establishing themselves in a situation in which they may subsequently have access to some administrative remedy to adjust their status to that of permanent residents. This practice is grossly unfair to aliens who await their turn on the quota waiting lists and who are deprived of their quota numbers in favor of aliens who indulge in the practice. This practice is threatening our entire immigration system and the incentive for the practice must be removed. Accordingly, under the bill, to justify the suspension of deportation the hardship must not only be unusual but must also be exceptionally and extremely unusual. The bill accordingly establishes a policy that the administrative remedy should be available only in the very

[25] S. Rep. No. 1137, 82d Cong., 2d Sess., p. 25.

limited category of cases in which the deportation of the alien would be unconscionable. Hardship or even unusual hardship to the alien or to his spouse, parent, or child is not sufficient to justify suspension of deportation. To continue in the pattern existing under the present law is to make a mockery of our immigration system.

A further indication of the stringent congressional policy as regards suspension is found in the circumstance that Congress insisted on reserving for itself a specific review of every case in which suspension was granted by the Attorney General, but made no such reservation when suspension was denied. It is thus apparent that Congress, recognizing the broad sweep of the Attorney General's power, was making certain that the suspension power could not be utilized to nullify the carefully spelled out provisions of the Act relating to deportation.

2. Unlimited discretion has always been available in the form of a congressional special bill for the benefit of an individual alien. However, as early as 1934 and 1935, an administrative approach was recommended in the form of legislation similar to that ultimately enacted in 1940 and reenacted in 1952, providing for voluntary departure and suspension of deportation in certain cases. S. Rep. No. 1515, 81st Cong., 2d Sess., 595–596; 78 Cong. Rec. 11789.[20]

[20] The obvious problems in relying upon a special bill for each alien to be extended clemency are well illustrated in

The analogy to executive clemency as regards criminal sentences, and the consequent breadth of the discretion, were recognized with respect to the earlier as well as later drafts of legislation. Thus, the early H. Rep. 1772, 73d Cong., 2d Sess. (May 24, 1934), p. 3, states:

> It will be observed that *even if the alien qualifies* under one of the six classes enumerated *favorable action is left to the discretion of the Secretary of Labor* [then in charge of these matters] * * *. [Emphasis added.]

Proponents and opponents of the early legislation referred to the procedure as "clemency" (81 Cong. Rec. 5546, 5569–5570), "leniency" (81 Cong. Rec. 4653–4654), "amnesty" (81 Cong. Rec. 5553, 5561, 5572), and compared it with "discretion in the President" (81 Cong. Rec. 5554). Also indicative of legislative purpose was the elimination from the 1940 drafts of language which had referred to the determination as one to be made upon a "quasi judicial" basis.[27]

As enacted in 1940 and 1948, the suspension provision[28] was not as emphatic as it is in the 1952 Act, since the former did not employ the

---

the testimony of the Commissioner of Immigration and Naturalization in 1935 (79 Cong. Rec. 14573–14574).

[27] *Hearing before a Subcommittee of the Senate Committee on the Judiciary*, 76th Cong., 3d Sess., on H. R. 5138, pp. 4, 28; S. Rep. No. 1796, 76th Cong., 3d Sess., pp. 2–3, 5; H. Rep. No. 2683, 76th Cong., 3d Sess., p. 3.

[28] Section 19 (c) of the amended 1917 Act. (See fn. 14, *supra*, p. 18.)

words "in his discretion." These words were added in the later enactment.

In 1947, when a congressional committee was considering proposed amendments to the suspension statute, the whole understanding of very broad discretion was openly laid before the committee by Mr. Shaughnessy, when he stated:[29]

> None of the provisions of this bill is mandatory upon the Attorney General. He has the discretion in every single case.
>
> * * * * *
>
> In vesting any discretionary power in these administrative folks, we realize that we are passing a law for all time, or at least for a long time in the future, and that there will be various personalities occupy that high position of Attorney General; but that is a gamble you have to make. There is nothing unusual about that.

Similarly, Attorney General Clark testified to a pattern in the exercise of the discretion which of necessity precluded a disclosure of the sources upon which that pattern was carried out:[30]

> * * * I think you know me well enough to know that I am going to administer it in the way justice warrants in the case, for the best interests of the United States.

---

[29] Hearings before the Subcommittee on Immigration and Naturalization of the House Judiciary Committee, 80th Cong., 1st Sess., on H. R. 245, H. R. 674, H. R. 1115, and H. R. 2933 (1947), pp. 35, 40.

[30] *Ibid.* at pp. 132–133.

These are the interests that I am going to see protected. If there is a doubt, I am going to resolve the doubt in favor of the United States, just as I have done in the past in reference to subversive matters. I have never permitted anyone, so far as I know, to enter the United States in the regular immigration channels, outside of diplomatic channels, that has belonged to the Communist Party, for example, since I have been Attorney General, and I don't intend to do that in the future.

Whenever in the United States an alien is found to belong to such an organization, we have immediately tried to bring about deportation. We can continue to do that.

* * * * *

You would not be depleting the quota from those countries to any material extent if this bill were passed in its present form. At the same time, sir, you do not know what you are getting when those persons come in. I do know what I have got when I put an O. K. on someone who is here now. You can bet we have looked into his background and conduct pretty closely.

In its study of the laws preparatory to the 1952 revision the Senate Judiciary Committee stated (S. Rep. No. 1515, 81st Cong., 2d Sess., p. 600):

> Suspension of deportation is a discretionary action. Technical compliance by the alien with the formal eligibility re-

> quirements does not necessitate a conclusion that he will be granted suspension of deportation. Where, by reason of specific unfavorable factors in the case the alien, in the opinion of the Commissioner, does not establish that he is entitled to the discretionary relief described in the law, the Commissioner frequently exercises his authority in denying the relief.

In the discussion of procedure the report noted that the investigator, who must "obtain, from persons having knowledge thereof, information concerning the alien's employment and earnings, his social activities, his home life, whether he has a record with the police in his place of residence in the preceding 5 years, whether he has been a recipient of public or private charity in the preceding 5 years, whether he appears loyal to the United States, and other pertinent facts that the course of the investigation may suggest * * *"

> is not required to take statements concerning such facts in writing or under oath. [*Id.* 598.]

The 1952 reenactment, moreover, must be viewed in the light of the then current interpretations by the courts that were a matter of public record with respect to the earlier enactment. The leading case of *United States ex rel. Kaloudis v. Shaughnessy*, 180 F. 2d 489 (C. A. 2) had been handed down two years before, in February 1950, holding that the provision for suspension created

a discretion the factual basis for which was not required to be the subject of outside evaluation or disclosure. Cf. *Knauff* v. *Shaughnessy*, 338 U. S. 537 (noted [31] in the congressional debates).[32]

Further significance appears from the deliberate aim of strengthening the completely discretionary nature of the suspension power, which was carried out by injecting the repetitive, emphatic language—"in his discretion"—after the words "the Attorney General may". This emanated from the typewritten analysis of the draft legislation (S. 3455, 81st Cong., 2d Sess., Apr. 20, 1950) prepared for the assistance of the congressional committees by the Immigration and Naturalization Service, an analysis specifically noted as having been considered by the committees (S. Rep. No. 1137, 82d Cong., 2d Sess., p. 3; H. Rep. No. 1365, 82d Cong., 2d Sess., p. 28; 98 Cong. Rec. 5089).[33] It was there suggested that (pp. 244–11, 244–14):

> [I]n order to indicate clearly that the grant of suspension is entirely discretion-

---

[31] 98 Cong. Rec. 5154, 5178.

[32] Against this authoritative background, Congress clearly could not assume that its enactment would preclude use of confidential information merely because protest had been made by the District Court in the *Alexiou* case (*supra*, pp. 35–36), largely upon an interpretation of regulations which the Government could and did clarify.

[33] This analysis was cited in *United States* v. *Menasche*, 348 U. S. 528, 534, and is presently lodged with the Librarian of this Court for use in connection with the instant case.

> ary, there be inserted on line 7, page 107, after the word "may" the language "in his discretion." * * *
>
> * * * * * *
>
> For the same reasons indicated above it is suggested that on line 8, page 108 [Sec. 244 (c) of the instant legislation] after the word "may" there be inserted "in his discretion."[34]

The change appears again in H. Rep. No. 1365, 82d Cong., 2d Sess., p. 191, where the provisions of the earlier law and proposed law are placed side by side.

The more recent legislative history is thus consistent with the entire trend of this legislation, which, in turn, shows a purpose to establish a wholly discretionary authority in the nature of pure clemency or pardon, a type of proceeding in which confidential information has historically been considered.[35]

3. In the face of the prior history and practice, Congress in its reenactment of 1952 must be assumed to have contemplated continued reliance on sources of information which could not in many instances be appropriately disclosed. The

[34] The suggested additional language was incorporated in the next draft (S. 716, 82d Cong., 1st Sess., Jan. 29, 1951, Sec. 244 (a) and (c)).

[35] Attempts to change the grounds of suspension from discretionary grant to fixed legislation were made and rejected, but the proposals to eliminate discretion were not rested upon objection to the breadth of sources of information (98 Cong. Rec. 4433, 4436, 5179).

failure to provide for a hearing or to require the disclosure of all information considered cannot be attributed to inadvertence, for in the debates the breadth and effect of numerous other provisions for administrative discretion were vigorously discussed by opponents and proponents of the Act. It may not be assumed that the Congress, in reenacting the measure, was unaware of the issues involved in the conferring of a broad discretion (*e. g.*, 98 Cong. Rec. 5114, 5154–5155, 5213, 5316, 5421, 5622, 5625–5626, 5787–5788). The failure of the Congress specifically to provide what petitioner now claims was intended is accordingly within the scope of Mr. Justice Cardozo's observation in *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. at 313:

> Acquiescence by Congress in an administrative practice may be an inference from silence during a period of years. In this instance the inference is strengthened when it is recalled that during some of those years the Commission was under fire. * * *

In sum, the legislative history suggests a very strong congressional purpose to confer upon the Attorney General a power in the nature of a pardoning power; a satisfaction with the actual practice under the system it had established; and no purpose to restrict the Attorney General as to the type of information which he could consider in exercise of the power.

D. THE REGULATION, WHICH LIMITS THE USE OF CONFIDENTIAL INFORMATION TO INSTANCES WHERE DISCLOSURE "WOULD BE PREJUDICIAL TO THE PUBLIC INTEREST, SAFETY, OR SECURITY", IS REASONABLE AND IN FULL ACCORD WITH THE STATUTE

The regulation, the validity of which is here in issue, is 8 C. F. R. (1952 ed.) 244.3. It provides:

> § 244.3 *Use of confidential information.* In the case of an alien qualified for voluntary departure or suspension of deportation under section 242 or 244 of the Immigration and Nationality Act the determination as to whether the application for voluntary departure or suspension of deportation shall be granted or denied (whether such determination is made initially or on appeal) may be predicated upon confidential information without the disclosure thereof to the applicant, if in the opinion of the officer or the Board making the determination the disclosure of such information would be prejudicial to the public interest, safety, or security.

This regulation does not permit an unlimited use of undisclosed confidential information. The Attorney General has not authorized its use in making determinations as to the applicant's statutory eligibility for relief. Its use is permitted only in determining whether discretion should be exercised, and, even then, only when "the disclosure of such information would be prejudicial to the public interest, safety, or security". These

limitations lend further support to the reasonableness and validity of the regulation.[36]

For the reasons already discussed, this regulation is in full accord with the manifested purposes of Section 244 of the 1952 Act. Petitioner's challenge, directed at the Attorney General's alleged lack of authority to provide for such limited use of confidential information must fail.

II. THE HEARING OFFICER AND THE BOARD OF IMMIGRATION APPEALS PROPERLY COMPLIED WITH ALL APPLICABLE REGULATIONS

While the main thrust of petitioner's attack is directed at the claimed invalidity of Regulation 8 C. F. R. (1952 ed.) 244.3 (*supra*, p. 49) (Pet. Br. 8–22; Am. Cur. Br. 6–21), he makes the alternative contention that the applicable regulations were not properly complied with (Pet. Br. 7, incorporating Am. Cur. Br. 21–29). Two alleged instances of non-compliance are advanced. Petitioner argues that the regulations provide, by implication, (1) that the applicant for suspension be furnished with a "fair résumé" of

[36] In actual practice, this regulation is invoked, and suspension decisions are predicated upon undisclosed confidential information, in but a relatively small number of cases. We are informed by the Chairman of the Board of Immigration Appeals that an estimated less than five percent of the suspension cases which are appealed to the Board involve confidential information. The Board has the same access to the confidential information as did the special inquiry officer, and affirms or reverses the official determination following its review of both record and non-record information.

the confidential information (Am. Cur. Br. 21–27) and (2) that the special inquiry officer must disclose in his opinion both the nature of the confidential information and the manner in which it affected his judgment (Am. Cur. Br. 27–29).

These contentions are without merit. They are directly refuted by the wording and context of the applicable regulations, the controlling language of which is that the exercise of discretion "may be predicated upon confidential information *without the disclosure thereof to the applicant*" (emphasis added). 8 C. F. R. (1952 ed.) 244.3 (*supra*, p. 49). Furthermore, no court has construed these regulations as having the meaning which petitioner urges, and the decisions relied on (Am. Cur. Br. 23–27) do not sustain his attempt to avoid the plain meaning and policy of the regulations in issue.

1. Petitioner and *Amicus Curiae* concede (Pet. Br. 7, incorporating Am. Cur. Br. 25) that "there is no rule of law requiring a hearing and the taking of evidence" before making a decision involving an exercise of executive clemency or the imposition or suspension of a criminal sentence. However, they ask this Court (Am. Cur. Br. 21–27) to negate the plain meaning of the words "without the disclosure thereof" used in the controlling regulation applicable to the exercise of discretion, suggesting the existence of inconsistency between the language of 8 C. F. R. (1952 ed.)

244.3 and that of 8 C. F. R. (1952 ed.) 242.53 (c), 242.54 (d) and 242.61 (a) (App. B, *infra*, pp. 58–61). The former specifically authorizes the use of undisclosed confidential information in reaching a decision on whether or not to grant the discretionary relief, while the latter provides for the use of evidence pertinent to the applicant's statutory "eligibility" for discretionary relief.

Petitioner and *Amicus Curiae* contend that since the Attorney General provided for a hearing as to certain aspects of the suspension proceedings, he never meant the language of Section 244.3 to provide for complete nondisclosure of the confidential information, in spite of his use of the words "without the disclosure thereof to the applicant." What the Attorney General really intended, petitioner urges, was that each applicant be provided with a "résumé [which] should be detailed and should reveal the source and nature of the accusation" (Am. Cur. Br. 26).

In advancing this contention petitioner totally overlooks that the allegedly inconsistent regulations were promulgated the same day (December 17, 1952, 17 F. R. 11469, 11514, 11515, 11517). He further fails to note the distinction between a determination of a matter of statutory eligibility and a determination of clemency once eligibility is established. As to the latter, the Attorney General saw fit to provide for a hearing in the usual

sense except with respect to matters of a confidential nature the disclosure of which would be prejudicial to the public interest, safety, or security.

The cases cited in support of petitioner's argument are not only completely distinguishable but are not even analogous. The first *Accardi* case, 347 U. S. 260, on which petitioner places his principal reliance (Am. Cur. Br. 25), holds only that an applicant is entitled to be accorded whatever benefits the regulations in fact provide. Furthermore, Accardi's suspension application had been made pursuant to the earlier regulations, applicable to the pre-1952 suspension statute, which made no specific provision for the use of confidential information. Nor do the cited selective service cases (Am. Cur. Br. 26) provide authority for interpreting the explicit language of the regulations here in issue in a way directly at variance with their plain meaning. Those cases dealt with a statute which specified the Department of Justice "shall hold a hearing" to determine a matter of statutory right; it was held that in this posture a "fair résumé of any adverse evidence" was an essential ingredient. See *United States* v. *Nugent*, 346 U. S. 1, 3, 6, and *Simmons* v. *United States*, 348 U. S. 397, 403.

2. Petitioner's final contention is that the hearing officer was required by Section 242.61 (a) of the regulations (App. B, *infra*, pp. 60–61) to "dis-

cuss the nature of the derogatory accusations and then recite how and why such information has affected his judgment" (Am. Cur. Br. 28).

Section 242.61 provides that the hearing officer's "decision shall also contain a discussion of the evidence relating to the alien's eligibility for such relief and the reasons for granting or denying such application". As regards petitioner's statutory eligibility for suspension, the special inquiry officer found in petitioner's favor, following an appropriate review of the evidence. However, he held against petitioner on the issue of whether discretionary relief should be granted, stating his reason as follows (R. 48):

> * * * after considering confidential information relating to the respondent, as is provided for under 8 CFR 244.3, it is concluded that the respondent's case does not warrant favorable action and that his application for suspension of deportation be denied.

This statement of his reason is all that the rule required in view of the express mandate of Section 244.3 that when the determination is predicated upon "confidential information * * * the disclosure of [which] would be prejudicial to the public interest, safety, or security" it is to be made "without the disclosure thereof to the applicant".

This determination was reviewed by the Board of Immigration Appeals, which reviewed both

the record evidence and the undisclosed confidential information and concluded (R. 51):

> Upon a full consideration of the evidence of record and in light of the confidential information available, it is concluded that the alien is not entitled to discretionary relief.

CONCLUSION

For the above reasons, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

SIMON E. SOBELOFF,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
JOHN V. LINDSAY,
Executive Assistant to the Attorney General.
GRAY THORON,
Assistant to the Solicitor General.
BEATRICE ROSENBERG,
J. F. BISHOP,
Attorneys.

L. PAUL WININGS,
General Counsel;
Immigration and Naturalization Service.

APRIL 1956.

APPENDIX A: STATUTE INVOLVED

1. Sections 244 (a) (5) and 244 (c) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 214-216, 8 U. S. C. 1254 (a) (5) and 1254 (c), are the statutory provisions governing the suspension of petitioner's deportation. They provide, in pertinent part:

> SEC. 244. (a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who—
>
> * * * * *
>
> (5) is deportable under paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17) or (18) of section 241 (a) for an act committed or status acquired subsequent to such entry into the United States * * *; has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this Act in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose

deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence;

* * * * *

(c) Upon application by any alien who is found by the Attorney General to meet the requirements of paragraph (4) or (5) of subsection (a) of this section, the Attorney General may in his discretion suspend deportation of such alien. If the deportation of any alien is suspended under the provisions of this subsection, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension. Such reports shall be submitted on the first and fifteenth day of each calendar month in which Congress is in session. If during the session of the Congress at which a case is reported, or, prior to the close of the session of the Congress next following the session at which a case is reported, the Congress passes a concurrent resolution stating in substance that it favors the suspension of such deportation, the Attorney General shall cancel deportation proceedings. If within the time above specified the Congress does not pass such a concurrent resolution, or if either the Senate or House of Representatives passes a resolution stating in substance that it does not favor the suspension of the deportation of such alien, the Attorney General shall thereupon deport such alien in the manner provided by law.

Sections 244 (a) (1) (2) (3) and (4) provide for suspension for other categories of aliens and are not pertinent to the instant case. Section 244 (b), 8 U. S. C. 1254 (b), governs suspension for aliens meeting the requirements of subsections 244 (a) (1) (2) and (3). It differs from Section 244 (c) in that the administrative action suspending deportation becomes final when Congress does not take affirmative action to the contrary.

2. Section 244 (d) of the Immigration and Nationality Act of 1952, 66 Stat. at 216, 8 U. S. C. 1254 (d), provides:

> SEC. 244 * * *
>
> (d) Upon the cancellation of deportation in the case of any alien under this section, the Attorney General shall record the alien's lawful admission for permanent residence as of the date the cancellation of deportation of such alien is made, and the Secretary of State shall, if the alien was classifiable as a quota immigrant at the time of entry and was not charged to the appropriate quota, reduce by one the quota of the quota area to which the alien is chargeable under section 202 for the fiscal year then current at the time of cancellation or the next following year in which a quota is available. No quota shall be so reduced by more than 50 per centum in any fiscal year.

APPENDIX B: REGULATIONS INVOLVED

The following regulations were those under which petitioner's application for suspension of deportation was considered. They were all promulgated on the same day, December 17, 1952, 17 F. R. 11469, 11514, 11515, 11517. The regulations

which comprise 8 C. F. R. (1952 ed.) Part 242—*i. e.* Sections 242.53 (c), 242.54 (d) and 242.61 (a)—were revised and renumbered in January 1956, 21 F. R. 97, 100. The revised regulations are not involved in the instant case.

1. 8 C. F. R. (1952 ed.) 242.53 (c),[1] 17 F. R. 11514, provides, in pertinent part:

> § 242.53 *Conduct of hearing*— * * *
>
> (c) *Special inquiry officers; specific duties.* * * * the special inquiry officer shall * * * (5) present the evidence, including the interrogation, examination, and cross-examination of the respondent and witnesses to the extent necessary, as to (i) alienage, (ii) date, place and manner of entry of the respondent into the United States, (iii) grounds for deportation, (iv) factors bearing upon the respondent's eligibility for discretionary relief if application therefor has been made, and (v) such other matter as may be pertinent to the issues in the case. * * * the special inquiry officer, in such cases and at such time during the hearing as he deems appropriate, may advise the respondent concerning application for the privilege of suspension of deportation or voluntary departure under the provisions of section 244 of the said Act, * * *

2. 8 C. F. R. (1952 ed.) 242.54 (d),[2] 17 F. R. 11515, provides, in pertinent part:

---

[1] A 1953 amendment, (18 F. R. 4926) did not relate to the quoted matter. The subject matter of Section 242.53 (c) is now covered by Sections 242.8 (a) and 242.16 (a) of the revised regulations (21 F. R. 100).

[2] This section was amended in 1955 (20 F. R. 3495) in certain respects not here relevant. The subject matter of

§ 242.54 *Contents of records; evidence.*
* * *

(d) *Application for discretionary relief.* * * * at any time during the hearing the respondent may apply for suspension of deportation on Form I–256A or for voluntary departure, under section 244 of the said Act. The burden of establishing that he meets the statutory requirements for discretionary relief shall be upon the respondent. He may submit any evidence in support of his application which he believes should be considered by the special inquiry officer.

3. 8 C. F. R. (1952 ed.) 242.61 (a),[8] 17 F. R. 11515, provides, in pertinent part:

§ 242.61 *Decision of special inquiry officer*—(a) *Preparation of written decision.* Except as provided in paragraph (b) of this section and § 242.76, the special inquiry officer shall, as soon as practicable after the conclusion of the hearing, prepare a written decision signed by him which shall set forth a summary of the evidence adduced and his findings of fact and conclusions of law as to deportability, unless such findings and conclusions are waived by the respondent orally during the hearing or by written waiver filed with the special inquiry officer after the conclusion of the hearing. If the respondent has applied for discretionary relief in accordance with

---

Section 242.54 (d) is now covered by Section 242.16 (e) of the revised regulations (21 F. R. 100). Also cf. Sections 242.14 (a) and 242.14 (b) of the revised regulations (*ibid.*).

[8] The subject matter of Section 242.61 (a) is now covered by Section 242.17 (a) of the revised regulations (21 F. R. 100).

the provisions of § 242.54 (d), the decision shall also contain a discussion of the evidence relating to the alien's eligibility for such relief and the reasons for granting or denying such application. * * *

4. 8 C. F. R. (1952 ed.) 244.3; 17 F. R. 11517, provides:

§ 244.3 *Use of confidential information.* In the case of an alien qualified for voluntary departure or suspension of deportation under section 242 or 244 of the Immigration and Nationality Act the determination as to whether the application for voluntary departure or suspension of deportation shall be granted or denied (whether such determination is made initially or on appeal) may be predicated upon confidential information without the disclosure thereof to the applicant, if in the opinion of the officer or the Board making the determination the disclosure of such information would be prejudicial to the public interest, safety, or security.

U. S. GOVERNMENT PRINTING OFFICE: 1956

IN THE

Supreme Court of the United States

October Term, 1955

No. 503

CECIL REGINALD JAY,

Petitioner,

vs.

JOHN P. BOYD, District Director, Immigration and Naturalization Service

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMERICAN JEWISH CONGRESS AS *AMICUS CURIAE*

WILL MASLOW
SHAD POLIER
Attorneys for
AMERICAN JEWISH CONGRESS
15 East 84th Street
New York 28, N. Y.

INDEX

CITATIONS

Cases

Statutes

Regulations

Miscellaneous

IN THE

Supreme Court of the United States

October Term, 1955

No. 503

CECIL REGINALD JAY,

Petitioner,

vs.

JOHN P. BOYD, District Director, Immigration and Naturalization Service

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMERICAN JEWISH CONGRESS AS *AMICUS CURIAE*

Statement of Interest

This brief *amicus curiae* is submitted with the consent of the parties.

The American Jewish Congress, a national organization established in 1918, is committed to the dual, and for us, inseparable purposes of promoting the creative survival of the Jewish people and of securing and extending American democracy. The special concern of the Jewish people in human rights derives from an immemorial tradition that proclaims, under the highest sanctions of faith and human aspiration, the common and inalienable rights

of all men. The American Jewish Congress has therefore always been unequivocally opposed to communism, fascism and all other forms of totalitarianism. Together with all Americans who prize the blessings of freedom we have repeatedly affirmed our readiness to make those personal and collective sacrifices reasonably calculated to safeguard our democracy. But we have likewise insisted that our nation's security is not enhanced when we resort to measures that violate the essential liberties whose preservation is our basic purpose.

We submit this brief *amicus* because we are convinced that hearing procedures allowing quasi-judicial officers to make determinations affecting the liberty of residents of the United States on the basis of secret dossiers subvert the fundamental procedural protections of our heritage of freedom.

Statement of Case

Petitioner is a 65 year old native of England who has resided in the United States since 1921 (R. 47) without acquiring United States citizenship (R. 16). His deportation was ordered in 1952 (R. 12) because he was a member of the Communist Party of the United States between 1935 and 1940 (R. 47). Petitioner thereupon on November 25, 1953 applied to the Immigration and Naturalization Service (hereinafter called the Service) for the discretionary relief of suspension of deportation, authorized by statute (R. 13). In accordance with regulations promulgated by the Attorney General, a hearing was held before a Special Inquiry Officer to determine whether (a) the petitioner met the statutory requirements for suspension of deportation and (b) whether the Special Inquiry Officer

should grant petitioner's application.[1] The Special Inquiry Officer, who had previously ordered petitioner's deportation (R. 29), found that the alien had not been a member of the Communist Party since 1940 (R. 47), had been a person of good moral character for the last ten years prior to his application for suspension and that his deportation would result in "extreme and unusual hardship" (R. 48). The Special Inquiry Officer concluded: "On the record, respondent appears to be qualified for suspension of deportation" (R. 48). He held, however, that on the basis of "confidential information relating to the respondent," the source, nature or details of which were not disclosed to the petitioner, suspension of deportation should not be granted (R. 48).[2] No reason was given for the denial of the application nor is there anything in the record to justify the denial.

On appeal, the Board of Immigration Appeals (hereinafter called the Board), after considering "the evidence

---

[1] The only witnesses at this hearing were those called by the alien. Counsel for the alien and the Service stipulated that a Service report "relative to the respondent's residence and character" might be introduced in the record after the hearing closed on the understanding that the alien would be given an opportunity to "refute" anything "derogatory" contained in the report (R. 42). The record does not contain this report.

[2] The petitioner has alleged that the so-called confidential information is merely the fact that the "American Committee for the Protection of the Foreign Born", listed as "subversive" on the Attorney General's proscribed list of organizations, has solicited support for the petitioner (as well as for others facing deportation) (R. 7). The Service has denied that the confidential information "was of the character or substance" alleged by the petitioner (R. 14) but otherwise has failed to give any inkling of the general nature of the derogatory material or of its source or contents. Thus the alien, as well as the Court, does not even know whether the disqualifying material relates to political conduct, financial matters, or even irrational prejudice. The information may perhaps be rebutted, if disclosed, but the alien cannot refute what is not disclosed to him.

of record" and "in light of the confidential information available," affirmed the decision of the Special Inquiry Officer (R. 51). No further appeals or administrative remedies were available to the alien within the Service or the Department of Justice.[3]

Petitioner then applied for a writ of habeas corpus challenging the use of confidential information not of record to deny him the statutory privilege he was otherwise qualified for (R. 7-9). The writ was denied (R. 19). On appeal, the Court of Appeals affirmed the denial of the writ, specifically upholding the use of non-record confidential information (R. 26). This Court granted certiorari (R. 28).

The Questions to Which This Brief Is Addressed

This brief is addressed to two questions:

1. Whether the Attorney General, having by regulation established hearing procedures authorizing a Special Inquiry Officer of the Service to determine whether a deportable alien should receive the discretionary relief of suspension of deportation, may vitiate such hearing by allowing such officer to deny such relief to an alien, otherwise qualified for it, solely and exclusively on the basis of "confidential information," not of record, the source, nature and details of which are not disclosed to the alien.

2. Whether a decision of a Special Inquiry Officer denying an application for suspension of deportation should be set aside and a new determination required where the decision, in violation of a regulation promulgated by the Attorney General having the force of law, does not contain a statement of "the reasons for granting or denying such application."

---

[3] 8 C.F.R. Sec. 6(1)(d)(2).

Summary of Argument

I. The Attorney General has delegated his power to suspend deportation to Special Inquiry Officers and given them virtually unlimited power to base their decisions on evidence that they decide to withhold from the alien. The regulation that permits the Special Inquiry Officers to consider such non-record information in the thousands of suspension of deportation hearings they hold each year is not authorized by the Immigration and Nationality Act and is therefore invalid. The Attorney General may not both direct that the exercise of discretion be based on a "hearing" and permit the hearing officer to use a form of adjudication that denies the essentials of a fair hearing. Congress carefully provided for and limited the use of non-record information in cases involving exclusion of immigrant aliens; its failure to direct such use in suspension of deportation cases involving domiciled aliens renders the regulation invalid.

II. Assuming nevertheless that the Attorney General may direct special inquiry officers to hold "hearings" on the issue of suspension of deportation and simultaneously vitiate that hearing by permitting them to use non-record information in deciding that issue, the Courts should resolve this inconsistency. This can and should be accomplished by requiring the Service to furnish the alien with a "fair resume" of such information, as has been done, in similar circumstances, under the Universal Military Training and Service Act. Such a requirement would reconcile, as nearly as possible, the otherwise inconsistent rules requiring a fair hearing but denying an essential requirement of a fair hearing.

III. The regulations promulgated by the Attorney General, which have the effect of law, require the Special Inquiry Officers who conduct hearings on suspension of deportation to render written decisions containing a discussion of the evidence and the reasons for granting or denying the relief sought. The decision of the Special Inquiry Officer in the case at bar failed to comply with that requirement and hence, independently of the arguments set forth above, the decision denying petitioner suspension of deportation must be set aside with directions that his application be redetermined.

I

The Attorney General has not been authorized by Congress to promulgate a regulation allowing applications for suspension of deportation to be denied upon the basis of non-record "confidential information" not disclosed to the applicant.

A. The role of the Special Inquiry Officer in the suspension of deportation

The courts that have had occasion to consider the question of the use of confidential information in passing upon applications for suspension of deportation have generally considered this problem in the abstract without the benefit of a description of how the system works in practice.[4] We believe that we can be of greatest help to the Court by submitting such a description to it.[5]

[4] See *Jay v. Boyd*, 222 F. 2d 820 (9th Cir. 1955), rehearing denied, 224 F. 2d 957 (1955); *United States ex rel Matranga v. Mackey*, 210 F. 2d 160, certiorari denied, 347 U.S. 967 (1954).

[5] For a description of the operation of our entire deportation law, see Maslow, *Recasting Our Deportation Law: Proposals for Reform*, 56 Columbia Law Rev. 309-366 (March 1956).

The Service has in the last four fiscal years ending June 30, 1954 deported an average of 20,000 aliens a year.[6] An even larger number of deportation hearings are held annually, a total of 37,249 being held in the last fiscal year.[7] In four-fifths of these hearings, deportability is not contested so that the main purpose of most of these hearings is to determine whether the deportation order shall be suspended.[8]

Although Congress has authorized the Attorney General to suspend deportation of a deportable alien,[9] he, by regulation, has delegated this power to the Special Inquiry Officers of the Service.[10] The regulations prescribe the manner in which the Special Inquiry Officer shall exercise this power and thus spell out the alien's rights.[11] The

---

[6] 1954 Annual Report of the Service, Table 33. This total does not include the hundreds of thousands of Mexican "wetbacks," *i.e.*, illegal entrants, who are expelled each year without formal procedures.

[7] Letter dated Dec. 13, 1955 from E. A. Loughran, Assistant Commissioner of Immigration, to Will Maslow.

[8] Task Force on Legal Services and Procedure, *Report on Legal Services and Procedure* (prepared for the Commission on Organization of the Executive Branch of the Government), p. 272 (1955), hereinafter cited as Hoover Legal Task Force Report.

[9] Immigration and Nationality Act, Sec. 244(a), 8 U.S.C. Sec. 1254(a).

[10] "In determining cases submitted for hearing, special inquiry officers shall exercise the authority contained in section 242(b) of the Immigration and Nationality Act to order deportation, and the authority contained in section 244 of the Immigration and Nationality Act to suspend deportation. * * *" 8 C.F.R. Sec. 242.6. On January 6, 1956, the Service promulgated new regulations revising former parts 242 and 243 of Title 8, 21 Fed. Reg. 97-102 (1956). Since these new regulations do not affect proceedings instituted before that date (8 C.F.R. Sec. 242.23), all references will be to the prior regulations.

[11] The Service is forbidden to violate its own regulations. *United States ex rel. Johnson v. Shaughnessy*, 336 U. S. 806, (1949); *Bridges v. Wixon*, 326 U. S. 135, 153 (1945).

alien is entitled to apply for suspension "at any time during the [deportation] hearing."[12] The burden of establishing that he meets the statutory requirements is upon the petitioner, who may submit any evidence in support of his application that he believes should be considered by the Special Inquiry Officer.[13] The Special Inquiry Officer, when such an application has been made, is required to "present the evidence" as to the "factors bearing upon the respondent's eligibility" for this relief.[14] After the conclusion of the hearing, the Special Inquiry Officer is required to prepare and sign a "written decision" which must contain "a discussion of the evidence relating to the alien's eligibilty for such relief and the reasons for granting or denying such application."[15] Finally, the decision must be concluded with an "order" which shall recite that the alien shall be deported or that his deportation shall be suspended.[16] The order of the Special Inquiry Officer is final,[17] except that the alien (or the Service) may appeal a decision of a Special Inquiry Officer denying suspension to the Board.[18] From its decision, the alien has no further appeal.[19]

---

[12] 8 C.F.R. Sec. 242.54 (d).

[13] *Ibid.*

[14] 8 C.F.R. Sec. 242.53 (c).

[15] 8 C.F.R. Sec. 242.61 (a). In the instant case, the Special Inquiry Officer failed to list, let alone discuss, the "reasons" for denying the alien's application (R. 48). This point is discussed in Point III, pp. *27* to *29*, *infra*.

[16] 8 C.F.R. Sec. 242.61 (c).

[17] 8 C.F.R. Sec. 242.61 (c).

[18] 8 C.F.R. Sec. 6.1 (b) (2).

[19] The Attorney General, however, may review any decision of the Board on his own motion, at the request of the Assistant Commissioner, Inspections and Examinations Division, or at the request of the Chairman or a majority of the Board. 8 C.F.R. Sec. 6.1 (h) (1).

In practice the Attorney General rarely reviews a decision of the Board, reviewing an average of only a dozen a year.[20] The Board itself closed 6,898 deportation cases in fiscal year 1954,[21] so that the Special Inquiry Officer was the final authority in the other 30,000 cases heard during that year, in most of which the question of suspension of deportation was the crucial issue. During the five fiscal years ending June 30, 1954, the Service ordered suspension in 23,329 cases or an average of 4,665 a year.[22]

To state therefore in speaking of the power to suspend that "Congress chose to rely upon the informed judgment of a cabinet officer with recognized facilities for investigation . . ."[23] is merely to look at the statute and to forget about the underlying regulations, which also have the force and effect of law.[24] Suspension, like deportation itself, operates on an assembly-line basis, administered by the entire Service and is not dependent on "the informed judgment" of a cabinet officer.

These Special Inquiry Officers, who are the final authority in such deportation cases, constitute a group of about 90[25] relatively minor officials of the Service.[26] They

---

[20] Testimony of Thomas G. Finucane, Chairman of the Board, Hearings before the House Appropriations Committee on the Department of Justice Appropriation for 1956, 84th Cong., 1st Sess., p. 37 (1955).

[21] *Hearings, supra* note 20, at p. 35.

[22] 1953 Annual Report of the Service, p. 35; 1954 Annual Report, p. 26.

[23] Brief for the Government in Opposition to Petition for Certiorari, p. 9.

[24] *United States ex rel. Accardi* v. *Shaughnessy*, 347 U. S. 260, 265 (1954); *United States ex rel. Johnson* v. *Shaughnessy*, 336 U. S. 806 (1949); *Bridges* v. *Wixon*, 326 U. S. 135, (1945).

[25] Hoover Legal Task Force Report, p. 273.

[26] They are paid $7,570 a year. *"Practices and Procedures of the Immigration and Naturalization Service in Deportation Proceedings."* Hearings Before the Subcommittee on Legal and Monetary Affairs, House Committee on Government Operations, 84th Cong., 1st Sess., p. 167 (1955).

do not enjoy the independent status of trial examiners under the Administrative Procedure Act;[27] are appointed by[28] and hold their office at the pleasure of the Commissioner of Immigration and are subject to his discipline.[29] Several governmental studies have alluded to the lack of educational qualifications of these Special Inquiry Officers. A Hoover Commission Task Force reported that only 24 of the 90 had "some legal education," of whom only 19 were attorneys.[30] The President's Commission on Immigration and Naturalization, reporting in 1952 on the qualifications of the Service's hearing officers (most of whom were later designated Special Inquiry Officers), stated that 60% of the 119 officers had neither a college degree nor legal training.[31]

These Special Inquiry Officers operate under the pressure of an almost incredible workload. Assuming 225 working days a year, in fiscal year 1954 they conducted an average of 1.8 deportation hearings and .7 exclusion hearings each working day.[32]

What this Court must pass on therefore is not "the informed judgment of a cabinet officer" exercising "the

---

[27] *Marcello* v. *Bonds*, 349 U. S. 302 (1955).

[28] 8 C.F.R. Sec. 9.1(b).

[29] The Service announced publicly that it had reprimanded a Special Inquiry Officer and had suspended him for 20 days without pay because he had failed to consider in a suspension case all the derogatory information concerning the alien in the files. H.R. Rep. No. 1458, 84th Cong., 1st Sess., p. 7-9 (1955). The incident is referred to in *Marcello* v. *Bonds*, 349 U. S. 302, 318-319 (1955).

[30] Hoover Legal Task Force Report, p. 273.

[31] *Whom We Shall Welcome*, Report of the President's Commission on Immigration and Naturalization, p. 163 (1953).

[32] In addition to 37,249 deportation hearings, the Special Inquiry Officers conducted 13,254 exclusion hearings during the fiscal year 1954. Hoover Legal Task Force Report, p. 272.

power of executive clemency" but the disposition of suspension applications by minor officials of the Service whose qualifications, workload and general lack of independence are not such as to command respect or inspire confidence.

B. The operating definition of "confidential information"

Regulation 244.3 of Title 8 of the Code of Federal Regulations provides:

> "In the case of an alien qualified for voluntary departure or suspension of deportation under Section 242 or 244 of the Immigration and Nationality Act the determination as to whether the application for voluntary departure or suspension of deportation shall be granted or denied (whether such determination is made initially or on appeal) may be predicated upon confidential information without the disclosure thereof to the applicant, if in the opinion of the officer or the Board making such determination the disclosure of such information would be prejudicial to the public interest, safety, or security."

Armed with such a boundless grant of authority, it would be surprising if Special Inquiry Officers of the type described were fastidious about the type of material they are permitted by Regulation 244.3 to label "confidential." Confirmation of these fears is afforded by the testimony taken recently by the House Committee on Government Operations in its intensive investigation of the *Brancato* suspension case, an apparently typical proceeding.

The House Committee revealed that there are two types of "confidential information": that which is "classified defense information" and that which the Special Inquiry

Officer himself labels as "confidential."[33] Revealing are the sworn descriptions by various Service officials on varying levels of authority of what is considered "confidential information." A Service investigator, one of whose functions is to assist the Special Inquiry Officer in preparing a case for hearing, described such confidential material as "merely information we received off the street."[34] A Special Inquiry Officer described it as "what might be termed as hearsay evidence, which could not be gotten in the record. . . ."[35] A district chief of the Service described it as "information from persons who were in a position to give us information that might be detrimental to the interests of the Service to disclose that person's name. . . ."[36] The head of the Investigating Division of the Service described it as "such things, perhaps, as income tax reports, or maybe a witness who didn't want to be disclosed, or where it might endanger their life, or something of that kind. . . ."[37]

Though these responses vary in sophistication, it is apparent that "confidential information" is information that cannot conveniently or properly be placed in evidence and that Service officials from the investigator at the bottom of the Service ladder to the chief of the Investigating Division near its top so regard it. The Service itself must consider the clause in Regulation 244.3 allowing nondisclosure only when disclosure is "prejudicial to the public interest, safety, or security" as mere window-dressing. Its Investigator's Manual (a confidential document de-

[33] *Hearings, supra* note 26, at pp. 138, 207 (testimony of a former district chief of the Examinations Division and of the Assistant Commissioner, Investigations Division, of the Service). See also the reference to the Investigators' Handbook of the Service, which refers to "non-record" information that is not classified. *Id.* at p. 207.

[34] *Id.* at p. 18.

[35] *Id.* at p. 67.

[36] *Id.* at p. 138.

[37] *Id.* at p. 207.

scribed by the House Committee on Government Operations) does not limit confidential information to that described in Regulation 244.3. The Manual instructs its investigators that:

> ". . . in certain types of cases requiring reports of character investigation, a report containing unfavorable information cannot be placed in evidence if such information is based on confidential records *or if adverse witnesses are unwilling to testify*. This applies for example to hearings involving suspension of deportation." (Emphasis added.)[38]

In such cases, the Manual continues, two reports shall be prepared: one containing all the information, favorable and unfavorable; the second, only the favorable. The shorter report is to be forwarded to the officer who requested the investigation to be placed in the hearing record. "*The full report, though not made a part of the hearing record, will be considered in making a decision in the case.*" (Emphasis added.)[39]

The House Committee on Government Operations undertook its investigation of the *Brancato* case not from any sympathy for aliens facing deportation but to determine why suspension of deportation had been granted to what it believed was a notorious racketeer. After a searching examination of the procedures of the Service in this case, it concluded, however, that "the use of confidential information as a basis for granting or denying relief is at complete variance with basic common law precepts."[40]

---

[38] *H.R.* Rep. No. 1458, 84th Cong. 1st Sess., p. 6 (1955).

[39] *Ibid.*

[40] H.R. Rep. No. 1458, 84th Cong. 1st Sess., p. 14 (1955). Judge Dimock who upheld the use of confidential material in suspension cases acknowledged: "I realize that this means that serious abuses are possible with grave consequences. . . ." *United States ex rel. Mafranga* v. *Mackey*, 115 F. Supp. 45, 49 (1953).

C. *Regulation 244.3 is not authorized by the Immigration and Nationality Act and is therefore invalid.*

The section of the Immigration and Nationality Act authorizing the Attorney General to suspend deportation "in his discretion" contains no reference to a hearing. We may assume therefore for the purposes of this brief that the Attorney General is not required to afford one to an alien seeking the discretionary remedy of suspension. But if the Attorney General on his own initiative prescribes a hearing, can he fix the type of hearing he desires, even one that allows the officers presiding at such hearings to consider non-record information in passing upon applications for discretionary relief?

It must be remembered that the Attorney General is not free to promulgate any regulations that may suit his fancy. Section 103 of the Immigration and Nationality Act authorizes the Attorney General to "establish such regulations . . . and perform such other acts as he deems necessary for carrying out his authority under the provisions of this Act." A regulation that is not only unnecessary to carry out his authority under the Act but is inconsistent with other provisions of the Act is not authorized by it.

The Attorney General has had the power since 1940 to suspend deportation of deportable aliens, except as to those who were in the subversive, criminal, narcotic or immoral classes.[41] Since December 24, 1952, even this limitation has been removed; there are today no deportable offenses that disqualify an alien from discretionary relief.[42]

---

[41] Smith Act, c. 939, Sec. 20, 54 Stat. 673 (1940), 8 U.S.C. Sec. 452 (1946).

[42] Immigration and Nationality Act, Sec. 244(a)(1-5), 8 U.S.C. Sec. 1254(a)(1-5).

For twelve years, this power to suspend deportation was exercised without a regulation allowing recourse to non-record information.[43] It cannot be said therefore that it is necessary to use confidential information in passing upon applications for suspension. It is true that the Immigration and Nationality Act for the first time allowed the suspension of aliens in the subversive, criminal, narcotic or immoral classes but Congress did not prescribe any different procedure for the disposition of their applications for suspension from those for all other types of deportable aliens. It merely required a longer period of residence and of good moral character and stipulated that it must affirmatively pass on each of the suspensions granted, whereas it allowed suspension in other types of deportable offenses to go into effect if it failed specifically to disapprove such suspensions.[44] Certainly evidence of the undesirability of deportable aliens, even those in the subversive, criminal, narcotic or immoral classes, could be introduced in an administrative type of hearing in which legal rules of evidence are not followed.[45]

In 1949, in *Matter of A.*, 3 I. & N. Dec. 714, A-6178382, the Board had before it a case in which a Presiding Inspector had recommended that suspension of deportation should be denied because the record of the hearing established that the alien had been a secretary of the International Workers Order, an organization on the Attorney General's list of "proscribed" organizations (p. 714). The

---

[43] *Matter of A.*, 3 I. & N. Dec. 714 (1949).

[44] Compare Sec. 244(a)(5) with Sec. 244(a)(3) of the Immigration and Nationality Act.

[45] *United States ex rel. Impastato v. O'Rourke*, 211 F. 2d 609 (8th Cir.), certiorari denied, 348 U. S. 827 (1954); *United States ex rel. Tisi v. Tod*, 264 U. S. 131, 133 (1924).

Central Office of the Service adopted the Presiding Inspector's recommendation and denied suspension on the ground that "The evidence in the file (some of it confidential in nature) establishes to our satisfaction that the alien's continued presence in the United States would be prejudicial to the interests of the country" (p. 715).

On appeal, the Board after discussing the applicable regulations stated (p. 716): "They likewise impose a duty to accord a fair hearing to an alien on the issue of discretionary relief" and concluded: "In short we hold that while the grant or denial of suspension of deportation is discretionary, the exercise of that discretion must be based upon the evidence of record" (p. 718).

The case having been certified for review to the Acting Attorney General at the request of the Service, on November 16, 1949, he approved the decision of the Board (p. 718). One month later, the Acting Attorney General withdrew his prior approval and disapproved the decision of the Board. No reason or explanation was furnished (p. 718). On appeal, the United States District Court for the District of Columbia reversed the Attorney General. *Alexiou* v. *McGrath*, 101 F. Supp. 421 (1951). The Court held:

> "Once the Attorney General has established the procedure affording an opportunity for a fair hearing as has been done here, then I do not believe his discretion can be exercised arbitrarily or capriciously in complete disregard of what appears on the record. These proceedings were infected with unfairness by a consideration of matters outside the record."[46]

---

[46] *Alexiou* v. *McGrath*, 101 F. Supp. 421, 424. The District Court concluded erroneously that the Service had found the alien ineligi for suspension. *Id.* at p. 425. In fact the Service denied suspension because it believed that the alien's presence in the United States

One year before the *Alexiou* decision, this Court had upheld an immigration regulation issued by the Attorney General that authorized him during a period of war or national emergency to exclude immigrant aliens, on the basis of confidential undisclosed information, from entering this country.[47]

In 1952 when Congress was debating the Immigration and Nationality Act, it was aware of the varying practice in exclusion and suspension proceedings and the differing holdings in the *Knauff* and the *Alexiou* cases. It enacted Sec. 244(a) of the Immigration and Nationality Act, which does not in any way refer to the use of confidential information in suspension cases. Simultaneously, Section 235(c) of that Act was enacted, specifically authorizing the exclusion of aliens on the basis of confidential information that need not be disclosed to the alien.[48] That section provides:

> "If the Attorney General is satisfied that the alien is excludable under any of such paragraphs [Sec. 212 (a)(27)(28) or (29) which relate to subversive activity] on the basis of information of a confidential nature, the disclosure of which the Attorney General,

---

would be prejudicial to United States interests, without ruling upon the alien's eligibility, which at that time necessitated only proof of good moral character and "serious economic detriment" to the alien or his immediate family. Act of July 1, 1948, 62 Stat. 1206, 8 U.S.C. Sec. 155 (c). In *Arakas v. Zimmerman*, 200 F. 2d 322, 324 (3d Cir. 1952), the Court stated "We agree entirely with the holding in Alexiou v. McGrath. . . ." The holding in the *Alexiou* case was followed in *Maetzu v. Brownell*, 132 F. Supp. 751 (D.C. D.C. 1955); *Orhovats v. Brownell*, 134 F. Supp. 84 (D.C. D.C. 1955); and *Ex parte Mota Singh Chohan*, 122 F. Supp. 851 (D.C. N.D. Calif. 1954).

[47] *United States ex rel. Knauff v. Shaughnessy*, 338 U. S. 537 (1950). The regulation in question, 8 C.F.R. 175.57(b), had been promulgated on July 21, 1945, 10 Fed. Reg. 8995 (1945) and was authorized by 22 U.S.C. Sec. 223. The substance of this regulation was later incorporated in Sec. 22 of the Subversive Activities Control Act of 1950, Act of Sept. 23, 1950, c. 1024, Sec. 22, 64 Stat. 1006.

[48] 66 Stat. 199-200, 8 U.S.C. Sec. 1225 (c).

in the exercise of his discretion, and after consultation with the appropriate security agencies of the Government, concludes would be prejudicial to the public interest, safety, or security, he may in his discretion order such alien to be excluded and deported without any inquiry or further inquiry by a Special Inquiry Officer."

The different modes of procedure were dictated by the differing powers of Congress when dealing with immigrant aliens and domiciled ones. Congress has almost plenary power to exclude an immigrant alien,[49] whereas its power when dealing with domiciled aliens is far more restricted.[50]

Nevertheless, without specific authorization, the Attorney General on December 19, 1952, shortly before the effective date of the Immigration and Nationality Act, promulgated Regulation Sec. 244.3.

It will be noted that the decision to withhold disclosure of the confidential information is not made by the Attorney General or the Commissioner of Immigration but by a Special Inquiry Officer or the Board. The Regulation does not require the approval of any other official of the Department of Justice to such non-disclosure.

The laxity of the procedure created by Regulation 244.3 may be contrasted with the provisions of Sec. 235(c) of the Immigration and Nationality Act which authorizes the exclusion of *immigrant* aliens on undisclosed "information of a confidential nature" but only when the exclusion is based on subversive activity and only if the Attorney General has been in "consultation with the appropriate

[49] *United States ex rel. Knauff v. Shaughnessy*, 338 U. S. 537, 544 (1950); *Nishimura Ekiu v. United States*, 142 U. S. 651 (1892).

[50] *The Japanese Immigrant Case*, 189 U. S. 86 (1903); *Lloyd Sabaudo Societa Anonyma v. Elting*, 287 U. S. 329 (1932).

security agencies of the Government."[51] Congress when it did authorize the use of confidential information without disclosure to the alien was unwilling to rely upon the judgment of the Attorney General alone but required him to consult with an appropriate security agency.

Regulation 244.3 goes far beyond the grant of authority in Sec. 235(c). There is nothing in the Regulation that confines its use to subversive aliens or aliens in any particular deportable category. There is nothing in the Regulation that limits the type of information that may be withheld. There is no requirement that it be confidential material transmitted to the Service by a security agency of the Government. There is no requirement that it be "classified" material. There is even no requirement that the determination of what is confidential be made by a person skilled in security matters. On the contrary, all that the Special Inquiry Officer needs to do to consider non-record information without disclosing its source, nature or contents is simply to state that he has done so, citing the Regulation. He does not even have to make a finding in the language of the Regulation that the disclosure "would be prejudicial to the public interest, safety, or security."[52]

It is incredible that Congress whose power to exclude an immigrant alien is almost plenary would carefully limit the uses of confidential information in considering the admissibility of aliens believed to be subversive and then in dealing with non-subversive domiciled aliens where its power is far more restricted authorize a relatively minor official of the Service to exercise arbitrary power, hiding behind information which he himself labels "confidential."

---

[51] 66 Stat. 199-200 (1952), 8 U.S.C. Sec. 1225 (c).

[52] *Jay* v. *Boyd*, 224 F. 2d 957 (1955).

When Congress authorized the Attorney General (or the Special Inquiry Officer to whom he has delegated his statutory power), in his discretion, to determine whether suspension of deportation should be allowed, it did not intend that this discretionary power be completely unfettered. It intended that the discretion in fact be exercised [53] and not be exercised arbitrarily or capriciously.[54] Nor may the denial of suspension be "actuated by considerations that Congress could not have intended to make relevant." [55]

But to allow the Service to deny suspension on the basis of non-record information is to allow it to exercise its discretion arbitrarily and capriciously. Indeed to allow it such arbitrary power means that no court will be able to confine its exercise to considerations that Congress would deem relevant, because no court will be able to determine why suspension is denied.[56] Instead of a discretionary power, it becomes a despotic power, because the Attorney General had made judicial review of his action impossible by authorizing the use of undisclosed non-record material, arbitrarily labelled confidential. Congress did not intend that the power to deny suspension of deportation should not be subject to judicial review.

Regulation 244.3 which permits this arbitrary power is not necessary to carry out the Attorney General's discre-

---

[53] *United States ex rel. Accardi* v. *Shaughnessy*, 347 U. S. 260 (1954).

[54] *United States ex rel. Eyangoulis* v. *Shaughnessy*, 210 F. 2d 572, 574 (2d Cir. 1954); *United States ex rel. Kaloudis* v. *Shaughnessy*, 180 F. 2d 489, 491 (2d Cir. 1950); *United States ex rel. Adel* v. *Shaughnessy*, 183 F. 2d 371 (2d Cir. 1950).

[55] *United States ex rel. Kaloudis* v. *Shaughnessy*, 180 F. 2d 489 (2 Cir. 1950).

[56] *See Boudin* v. *Dulles*, 136 F. Supp. 218 (D.C. D.C. 1955).

tion under the Immigration and Nationality Act, is inconsistent with other provisions of that Act and makes judicial review of that power impossible. It is therefore invalid and must be stricken by this Court. The Court should order the proceeding remanded to the Service with a direction that it reconsider the petitioner's application for suspension of deportation on the basis of record evidence alone.

II

The Attorney General having promulgated inconsistent regulations, that both require a fair hearing in passing upon an application for suspension of deportation and allow such hearing to be vitiated by the use of non-record information not disclosed to the applicant, the courts must resolve the inconsistency by requiring that the applicant be furnished a "fair resume" of such non-record information.

This argument is based on the assumption that Regulation 244.3 is held to be valid.

The Immigration and Nationality Act authorizes the Attorney General to suspend the deportation of any deportable alien provided the alien meets certain statutory requirements. The Act is silent as to the manner in which the Attorney General shall determine whether the alien meets such requirements or how he shall exercise the discretion entrusted to him. The Act thus does not require a hearing to determine either eligibility for suspension or whether the discretion shall be exercised in the alien's favor;

The Attorney General, being free to proceed without a hearing, nevertheless prescribed one.[57] He required first that the application should be made during the hearing[58] held for the purpose of determining deportability *and as part of it*.[59] The Special Inquiry Officer is directed to receive the evidence presented by the alien or, upon the

---

[57] The Attorney General who is entrusted by the Immigration and Nationality Act with other discretionary powers has not seen fit to prescribe hearing procedures for their exercise. Thus he is authorized by Sec. 243(h), 8 U.S.C. Sec. 1253(h), "to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution. . . ." The Regulations issued by the Attorney General to implement this statutory provision require the applicant to appear before a Special Inquiry Officer "for interrogation under oath." The alien may submit evidence in support of his claim "during the interrogation." The decision on the claim is made by the regional commissioner. No appeal lies from a denial of the claim. 8 C.F.R. Sec. 243.3(b)(2)(3) (1956 Cum. Pocket Supp.).

Similarly the Attorney General has not seen fit to prescribe a hearing to pass upon applications for change of status from that of a non-immigrant visitor to that of a person lawfully admitted for permanent residence, a discretionary power vested in him (Sec. 245(a), 8 U.S.C. Sec. 1255(a)). Instead he has prescribed an "examination" of the alien-applicant, in which the alien may be accompanied and represented by an attorney, witnesses are examined, briefs submitted, a report of findings prepared by the immigration officer together with recommendations, and a decision made by the district director, appealable to the Assistant Commissioner, Inspections and Examinations Division, who has the final authority to grant or deny such application. The term "hearing" is never used in this portion of the regulations (8 C.F.R. Sec. 245.13, 245.17). Like procedures are provided for applications to create a record of lawful admission for permanent residence (which the Attorney-General "in his discretion" may grant), where the regulations provide only an "examination" not a "hearing" (8 C.F.R. Sec. 249.12, 249.14, 249.16).

[58] The regulations explicitly declare that the proceeding before the Special Inquiry Officer "shall be termed a hearing." 8 C.F.R. Sec. 242.5.

[59] 8 C.F.R. Sec. 242.54(d). Applications will not be received after a hearing has been concluded. Matter of M., 5 I. & N. Dec. 472, 473 (1953). The alien ordered deported must first make an application, as in the present case (R. 13), to reopen the hearing.

latter's failure to do so, to present the evidence himself (8 C.F.R. Sec. 242.53(c)) as to the factors bearing upon the alien's eligibility for such relief. The Special Inquiry Officer is specifically enjoined to "conduct a fair and impartial hearing" (8 C.F.R. 242.53). He must "at the commencement of the hearing" advise the alien "that he will have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government. . . ." Following the hearing, the written decision must contain among other things a "discussion" of the "reasons for granting or denying such application."[60] From such a decision, the alien is entitled as a matter of right to a full appeal to an independent Board of Immigration Appeals, whose decision may not be "dictated" by the Attorney General.[61] The Board may review the decision of the Special Inquiry Officer upon the law, the facts or even on the discretionary question whether relief should be granted or denied.[62]

The Service interprets these regulations as authorizing it to compartmentalize the hearing. It concedes that constitutional due process requires a full and fair hearing, in which the decision is based solely on record information, as to the deportation phase of the hearing. But it insists that the statute does not require that the suspension phase shall be fair and that consequently the decision to deny suspension can be based on non-record information in complete disregard of all of the evidence in the record and indeed without any record evidence to justify it.

---

[60] 8 C.F.R. Sec. 242.61(a).

[61] *United States ex rel. Accardi* v. *Shaughnessy*, 347 U. S. 260, 266 (1954).

[62] 8 C.F.R. Sec. 6.1(d).

Can the Attorney General thus make a fraud and sham of the hearing he himself has prescribed by authorizing the consideration of so-called non-record secret information? Can he on the one hand maintain that aliens will be given a hearing on their application for discretionary relief and on the other vitiate the very essence of such a hearing? Can he conduct a hearing like a "game of blindman's buff?"[63]

In United States ex rel. Accardi v. *Shaughnessy*, 206 F. 2d 897 (2d Cir. 1953), the court stated in considering an appeal from a denial of an application for suspension of deportation (at p. 901):

> "We may assume, *arguendo*, as we did in United States *ex rel.* Weddeke v. Watkins, 166 F. 2d 369, 371, certiorari denied, 333 U. S. 876, 68 S. Ct. 904, L. Ed. 1152, that since the Attorney General has provided by regulations the procedure by which a deportable alien is accorded a hearing on his application to suspend deportation, that he is entitled to procedural due process in the conduct of such hearing; that is, the requirement of a fair hearing must be met."[64]

---

[63] *Simmons* v. *United States*, 348 U. S. 397, 405 (1955).

[64] Other courts have likewise assumed or held that a hearing prescribed by regulation involving an application for discretionary relief must be fair. *United States ex rel. Salvetti* v. *Kramer*, 103 Fed. 777, 779 (2d Cir. 1939) (dictum); *United States ex rel. Bauer* v. *Shaughnessy*, 115 F. Supp. 780, 783 (S.D. N.Y. 1953); *United States ex rel. Giglione* v. *Miller*, 80 F. Supp. 655 (S.D. N.Y. 1949). In the last case Judge Rifkind stated: "* * * it is now accepted that procedural due process must be observed in a hearing even though the alien is invoking relief which is in any event afforded only at official discretion." (at p. 657).

The Court of Appeals, nevertheless, rejected the contention that the hearing had not been fair. This Court granted certiorari and then held that the Board must "exercise its own independent discretion, *after a fair hearing, which is nothing more than what the regulations accord petitioner as a right.*"[65] (Emphasis added)

What distinguishes the determination whether suspension of deportation shall be granted from other situations involving matters of grace or exercise of executive clemency is the limitation imposed by the Attorney General that such determination shall be made after a hearing. A judge may impose a criminal sentence upon the basis of an ex parte probation report not disclosed to the defendant, because there is no rule of law requiring a hearing and the taking of evidence before such sentence is imposed.[66] The Attorney General may reject an alien's claim that he will be subject to physical persecution if deported to a particular country because neither statute nor regulation requires a hearing on such claims.[67]

There is one way at least in which the consistency between a requirement for a fair hearing and the authorization to use undisclosed non-record information in that hearing can be resolved (assuming that the latter regulation is valid). Such a course was devised by this Court in construing the Universal Military Training and Service Act.[68]

---

[65] *United States ex rel. Accardi v. Shaughnessy*, 347 U. S. 260, 268 (1954).

[66] *Williams v. New York*, 337 U. S. 241 (1949).

[67] *United States ex rel. Dolenz v. Shaughnessy*, 206 F. 2d 392 (2d Cir.), certiorari denied, 345 U. S. 928 (1953); 8 C.F.R. Sec. 243(b). (1956 Pocket Supp.).

[68] Act of June 24, 1948, c. 652, 62 Stat. 604, 50 U.S.C. App. Sec. 451 *et seq.*

Under Section 6(j) of that Act,[69] a draft registrant who claims exemption from military service because of conscientious objections based on religious beliefs is entitled to appeal to an appeals board from a denial of his claim by the local draft board. The appeals board is required to refer such claim to the Department of Justice for "inquiry and hearing." This Court upheld the right of the appeals board to consider a confidential FBI report on the registrant's activities submitted to it ex parte by the Department of Justice but nevertheless required the appeals board to furnish the registrant a "fair resume" of the FBI report.[70] The nature of this "fair resume" was spelled out in the later case of *Simmons* v. *United States*, where the Court held that a "fair resume" is "one which will permit the registrant to defend against the adverse evidence—to explain it, rebut it, or otherwise detract from its damaging force."[71]

This Court should at least enforce a similar requirement in these suspension cases. It should require a fair resume of the confidential material to be furnished the alien so that he can defend himself against the derogatory material. Particularly where the confidential information is not a "classified" document, the resume should be detailed and should reveal the source and nature of the accusation. Even where the information comes from a security agency of the government, it should be sufficiently detailed and precise

[69] 62 Stat. 612, 50 U.S.C. App. Sec. 456(j).

[70] *United States* v. *Nugent*, 346 U. S. 1 (1953). In *Gonzales* v. *United States*, 348 U. S. 407, this Court held that the registrant was also entitled to a copy of the report and recommendations submitted by the Department of Justice to such appeals board.

[71] *Simmons* v. *United States*, 348 U. S. 397, 405 (1955). In that case, the summary furnished was deemed inadequate and the hearing therefore held to be "lacking in basic fairness." *Id.* at 405.

so that the alien can, if he is able, "rebut it, or otherwise detract from its damaging force." Such disclosure will rehabilitate the hearing required by the Attorney General, provide a minimum of fairness to the applicant and interfere in the least possible degree with the operations of any genuinely confidential intelligence function of the Government.

III

An alien is entitled to a statement of the reasons for the denial of his application for suspension of deportation.

Whether or not Regulation 244.3 is valid and whether or not this Court compels a fair resume of the confidential information relied upon by the Service to be furnished the alien, this Court should require a redetermination of the alien's application.

The regulations promulgated by the Attorney General, which may not be violated by the Service, require a hearing on an alien's application for suspension of deportation. The regulations likewise require the Special Inquiry Officer who presides at such hearing to render a written decision and stipulate that "the decision shall also contain a discussion of the evidence relating to the alien's eligibility for such relief and the reasons for granting or denying such application."[32]

Presumably, the purpose of this requirement is to ensure that the decision of the Special Inquiry Officer shall be a reasoned one, not based on prejudice or caprice. This

[32] 8 C.F.R. Sec. 242.61(a).

requirement also enables the Board, entrusted with appellate or supervisory jurisdiction over the decisions of the Special Inquiry Officer, to weigh the reasons for his action against the evidence in the record or, if Regulation 244.3 is valid, against the contents of whatever confidential material is considered either by the Special Inquiry Officer or the Board. Similarly, the existence of a reasoned opinion enables the Attorney General to assess the wisdom of the actions of his subordinates and when he is so minded to reverse their decisions.

Regulation 244.3 furnishes no excuse for failing to comply with the requirement of Regulation 242.53(c). Even when the Special Inquiry Officer has considered confidential non-record material, he is still able to list the reasons for denying suspension. He may, for example, declare that the confidential information indicates that the alien is engaged in unlawful subversive activity or is a member of a proscribed organization. He may declare that, despite the alien's lack of a criminal record, he is apparently engaged in illegal or immoral enterprises. In short without disclosing the confidential information, he can discuss the nature of the derogatory accusations and then recite how and why such information has affected his judgment.

But the Special Inquiry Officer in the instant case, in violation of Regulation 242.53(c), has failed to give the slightest inkling or indication of a reason for his action. He has merely held that suspension should be denied because of so-called "confidential information, relating to the respondent." That is not a "reason." It is a bald conclusion in support of the decision but without explaining it.

This deliberate flouting of Regulation 242.53(c) is not a technical or trivial violation. It undermines the entire hearing machinery prescribed by the Attorney General. It is a prejudicial error that taints the entire proceeding with arbitrariness and unfairness.

This violation of a Regulation having the force and effect of law and which is binding upon the Service requires this Court to stay the order of deportation issued against the alien and to command a redetermination by the Special Inquiry Officer of the petitioner's application for suspension, a redetermination that must conclude with an opinion stating the reasons for denying such application in sufficient detail and precision so that the alien can, on appeal or otherwise attempt to rebut them.

Conclusion

On any of three different grounds, this Court should reverse the decision of the court below and order a redetermination of the alien's application for suspension of deportation. First, the application has been denied, arbitrarily and capriciously, on the basis of non-record information not disclosed to the alien, the use of which is not authorized by the Immigration and Nationality Act. Second, even if the use of confidential information is valid, the alien was improperly denied a "fair resume" of such information, and thus deprived of the fair hearing required by law. Third, the denial of suspension was invalid in any event because the Service violated its own regulations in not disclosing in its decision the reasons for denying suspension.

The auxiliary directions that should accompany the reversal will vary according to the ground upon which it is based. If Regulation 244.3 is held invalid, then further consideration of non-record confidential information should be precluded. If Regulation 244.3 is upheld, then a "fair resume" of the confidential information should be furnished to the alien. And even if Regulation 244.3 is held valid, the Service should be commanded to obey its own regulations requiring the alien to be furnished with a signed written opinion discussing or at least stating the reasons for the denial of his application. Viewed from any of these three aspects, the denial by the Service of the petitioner's application for suspension of deportation should be set aside.

Respectfully submitted,

WILL MASLOW
SHAD POLIER
Attorneys for
AMERICAN JEWISH CONGRESS
Amicus Curiae

March 30, 1956.